INDEX

Opinions Below 1

Jurisdiction 2

Questions Presented For Review 3–4

Constitutional Provisions Involved 4

Statement Of The Case 4–6

Reasons For The Grantment Of Certiorari By This Court ... 7

I. The issuance of the certificate of probable cause by the District Court below, entitled the petitioner on appeal to the United States Court of Appeals for the Fourth Circuit, to more than the summary denial and dismissal given to him by that Court based upon the reasons stated by the District Court in its denial of habeas relief 7–8

II. Robert E. Porth was denied a fair trial by reason of the fact that the trial judge did not exercise care sufficient to protect Porth's constitutional right to a fair and impartial trial, in particular, the Federal Courts have repeatedly held that the trial judge is under an affirmative duty to shield the accused from the prejudicial effects of massive, adverse publicity 8–17

III. Robert E. Porth was denied a fair trial by reason of the fact that the State's primary witness testified while in fear of being arrested, and has subsequently repudiated her testimony. 18–19

IV. Robert E. Porth was denied a fair and impartial trial by reason of the fact that testimony concerning the death of his daughter was erroneously admitted into evidence. 20–21

V. Robert E. Porth was denied a fair and impartial trial by reason of the fact that the trial court

permitted testimony concerning an autopsy which was performed on Mrs. Porth five months after her death without a showing as to treatment of the body in the interim. 21–22

VI. Robert E. Porth is entitled to a hearing on his petition for habeas corpus. 23

CONCLUSION 24

Issue No. I. 24

Issue No. II. 24

Issue No. III. 25

Issue No. IV. 25–26

Issue No. V. 26

Issue No. VI. 26–27

PRAYER FOR RELIEF 27–28

Verification 28

Appendix: Page

Memorandum Opinion and Order of the U.S. District for the Middle District of N.C. entered October 26–1971 ..... A–1 to A–8

Memorandum Order of the U.S. District Court for the Middle District of N.C. entered December 29, 1971 ... A–9

Memorandum Decision of the United States Court of Appeals for the Fourth Circuit, entered January 24, 1973 ..... A–10

Petition for Rehearing, filed in the U.S. Court of Appeals for the Fourth Circuit in January, 1973 A–11 –14

Receipts showing the payment of the appeal fee, the Docketing fee in the U.S. Court of Appeals for the Fourth Circuit and posting of the bond ... A–15 to A–16

Order of the United States Court of Appeals for the Fourth Circuit, entered February 9, 1973, amending and deleting portion of the Memorandum Decision of January 24, 1973 ..... A–17

Order of the United States Court of Appeals, entered March 5, 1973, denying the petition for rehearing filed by the petitioner A–18

Certificate of Service A–19

CITATIONS

U. S. Constitution, Section 1, Amendment XIV 4

CARAFAS v. LaVALLEE, 391 U.S. 234, 241 (1968).. 7

DELANEY v. UNITED STATES, 199 F. 2d 107 (1st (Cir. 1952) 16

ESTES v. STATE OF TEXAS, 381 U.S. 532, 85 S. Ct. 1682, 14 L. Ed. 2d 543 (1965) 9, 11

GARRISON v. PATTERSON, 391 U.S. 464, 466 (1968).. 7

HOLT v. UNITED STATES, 218 U.S. 245, 251 14

IRVIN v. DOWD, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961) 9,11,16

MARSHALL v. UNITED STATES, 360 U.S. 310, 3 L. Ed. 2d 1250, 79 S. Ct. 1171 (1959)... 10, 12, 13, 14, 17

MICHELSON v. UNITED STATES, 335 U.S. 469, 475.. 15

NOWAKOWSKI v. MARONEY, 386 U.S. 542, 543 (1967) 7

PATTERSON v. STATE OF COLORADO, 205 U.S. 454, 462, 27 S. Ct. 556, 558, 51 L. Ed. 879 (1907).... 9

SHEPPARD v. MAXWELL, 384 U.S. 333, 16 L. Ed. 600, 86 S. Ct. 1507 (1966) 7, 9, 12, 17

SIBBALD v. UNITED STATES, 12 Peters, 492 20

STATE v. CASEY, 201 N.C. 620, 161 S.E. 81 (1931) 19

STATE v. CHRISTIE, 221 A. 2d 20 (N.J.) 27

STATE v. ELLERS, 234 N.C. 42, 65 S.E. 2d 503 (1951) .. 19

STATE v. MARSH, 134 N.C. 184 at 200 (1903) 20

TOWNSEND v. SAIN, 377 U.S. 293, 318 (1963) 23

UNITED STATES v. COTTON, _____F. Supp._____ (E.D. Wis. 1969) 12

UNITED STATES ex. rel. SHEFFIELD v. WALLER (1954, D.C. La.), 126 F. Supp. 537, Certificate den. (C.A. 5), 224 F. 2d 280, Cert. den. 350 U.S. 922, 100 L. Ed. 807, 76 S. Ct. 217 16

UNITED STATES ex rel. SIEGAL v. FOLLETTE, (D.C. N.Y.), 290 F. Supp. 636 7

Miscellaneous:

40 C.J.S. Homicide s/s 257(b), at Page 1204 21

American Bar Association Standards, relating to fair trial and free press 24

Wisc. L. Rev. 209 at 211 12

Wisc. L. Rev. 209 at 213 13

SUPREME COURT OF THE UNITED STATES

FALL TERM, 1972

NO._____

ROBERT E. PORTH,

Petitioner,

vs.

WARDEN OF THE STATE PENITENTIARY
OF NORTH CAROLINA

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioner, Robert E. Porth, prays that a Writ of Certiorari issue to review the MEMORANDUM DECISION of the United States Court of appeals for the Fourth Circuit, entered in this cause on January 24, 1973 and the ORDER, denying petition for rehearing entered in this cause by the United States Court of Appeals for the Fourth Circuit on March 5, 1973.

OPINIONS BELOW

A. The United States District Court for the Middle District of North Carolina, entered a MEMORANDUM OPINION AND ORDER, denying the application of the petitioner for writ of habeas corpus, without the holding of an evidentiary hearing, by date of October 26, 1971. (A–1 to A–8)

B. The United States District Court for the Middle District of North Carolina, entered a MEMORANDUM ORDER, granting the application for a certificate of probable cause to appeal, on December 29, 1971. As shown by a copy of said MEMORANDUM ORDER attached hereto as Appendices Page A–9.

C. The United States Court of Appeals for the Fourth Circuit entered on January 24, 1973 a MEMORANDUM DECISION, in which the appeal of the petitioner was summarily denied and dismissed for the reasons as stated by the District Court. See copy of such MEMORANDUM DECISION, attached hereto as Appendices Page A–10.

D. The United States Court of Appeals for the Fourth Circuit, entered on February 9, 1973, an ORDER, in which certain factual errors in the MEMORANDUM DECISION entered by the Court on January 24, 1973 was corrected, as to the status of the petitioner in the Court. See a copy of the ORDER, attached hereto as Appendices Page A–17

E. The United States Court of Appeals for the Fourth Circuit, entered on March 5, 1973, an ORDER, in which the petitioner's petition for rehearing, was denied. See a copy of the ORDER, attached hereto as Appendices Page A–18

JURISDICTION

A. The last ORDER of the United States Court of Appeals entered in this matter on March 5, 1973, was a denial of the petitioner's petition for a rehearing of the MEMORANDUM DECISION, entered in this cause on January 24, 1973. A–18

B. The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1) and Rule 19 of the Rules of the Supreme Court of the United States.

C. That the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit is being filed and docketed in apt time, well with the 90 days allowed for such filing from the date of the ORDER denying rehearing, entered in this cause on March 5, 1973.

QUESTIONS PRESENTED FOR REVIEW

I. DOES THE ISSUANCE OF A CERTIFICATE OF PROBABLE CAUSE BY THE DISTRICT COURT, ENTITLE A PETITIONER ON APPEAL TO A UNITED STATES COURT OF APPEALS, TO MORE THAN A SUMMARY DISMISSAL OF HIS APPEAL, BASED UPON THE REASONS STATED BY THE DISTRICT COURT IN ITS DENIAL OF HABEAS RELIEF?

II. WAS ROBERT E. PORTH DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE TRIAL JUDGE DID NOT EXERCISE CARE SUFFICIENT TO PROTECT PORTH'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL, IN PARTICULAR, THE FEDERAL COURTS HAVE REPEATEDLY HELD THAT THE TRIAL JUDGE IS UNDER AN AFFIRMATIVE DUTY TO SHIELD THE ACCUSED FROM THE PREJUDICIAL EFFECTS OF MASSIVE, ADVERSE PUBLICITY?

III. WAS ROBERT E. PORTH DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE STATE'S PRIMARY WITNESS TESTIFIED WHILE IN FEAR OF BEING ARRESTED, AND HAS SUBSEQUENTLY REPUDIATED HER TESTIMONY?

IV. WAS ROBERT E. PORTH DENIED A FAIR AND IMPARTIAL TRIAL BY REASON OF THE FACT THAT TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER WAS ERRONEOUSLY ADMITTED INTO EVIDENCE?

V. WAS ROBERT E. PORTH DENIED A FAIR AND IMPARTIAL TRIAL BY REASON OF THE FACT THAT THE TRIAL COURT PERMITTED TESTIMONY CONCERNING AN AUTOPSY WHICH WAS PERFORMED ON MRS. PORTH FIVE MONTHS AFTER HER DEATH WITHOUT A SHOWING AS TO TREATMENT OF THE BODY IN THE INTERIM?

VI. WAS ROBERT E. PORTH ENTITLED TO A HEARING ON HIS PETITION FOR HABEAS CORPUS?

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment ot the United States Constitution:

> "...All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws..."

STATEMENT OF THE CASE

A. In February, 1966 in Forsyth County Superior Court, Winston-Salem, North Carolina, the petitioner was found guilty by a jury of first degree murder of his wife, and pursuant to the jury's recommendation of mercy, he was sentenced to the State Penitentiary for the term of his natural life. His conviction was affirmed by the North Carolina Supreme Court in STATE v. PORTH, 269 N.C. 329, 153 S.E. 2d 10 (1967). On February 23 and 24, 1970, the petitioner received a post-conviction hearing in the Forsyth County Superior Court. The Honorable J. William Copeland, who presided over the hearing, denied relief. A subsequent petition for a writ of certiorari to the North Carolina Court of Appeals was denied. That the petitioner represented by counsel instituted an action for petition for writ of habeas corpus in the United States District Court for the Middle District of North Carolina, raising the issues presented to the Court herein in Question Presented For Review, Nos. II, III, IV and V. That on October 26, 1971, the District Court below entered a MEMORANDUM OPINION AND

ORDER (A–1 to A–8) denying habeas corpus relief without an evidentiary hearing in the District Court.

B. That the petitioner submitted a Motion for Reconsideration of the denial of habeas corpus relief which was denied by Memorandum Order dated December 3, 1971. That on December 7, 1971, the petitioner submitted a document entitled "Supplement to Motion for Reconsideration Filed in this Cause.", which was denied by Order entered December 8, 1971. That the petitioner then filed an APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL on December 15, 1971. That by MEMORANDUM ORDER, entered in this cause on December 29, 1971, a certificate of probable cause was issued. That a copy of the MEMORANDUM ORDER OF JUDGE GORDON of December 29, 1971 is attached hereto as Appendices Pages A–9.

C. That on January 24, 1973, the United States Court of Appeals entered a MEMORANDUM DECISION, in which it is stated:

> "...A review of the record and of the district court's opinion discloses that an appeal from the order of the district court refusing habeas corpus relief would be without merit. Accordingly, although leave to proceed in forma pauperis is granted, a certificate of probable cause to appeal is denied and the appeal is dismissed for the reasons stated by the district court."

See copy of MEMORANDUM DECISION, attached hereto as Appendices Page A–10.

D. That in January, 1973, the petitioner verified and mailed to the United States Court of Appeals a PETITION FOR REHEARING, pointing out, that he was not proceeding in the case as a pauper, that he had paid all fees and costs in the matter, both in the District Court and in the United States Court of Appeals for the Fourth Circuit, and that he was not applying to the United States Court of Appeals for a certificate

of probable cause to appeal, as the Certificate of probable cause to appeal had been issued by the District Court below. That such attachments were enclosed as stated including the MEMORANDUM DECISION of the Court of Appeals of January 24, 1973 (A–10) and the MEMORANDUM ORDER of December 29, 1971 of Judge Gordon of the District Court below issuing the certificate of probable cause to appeal (A–9); and the Receipts for the payment of the appeal fee in the District Court below, and the docketing fee or $25.00 and the appeal bond of $250.00 in the U.S. Court of Appeals as shown on Appendices Page A–15–16. That also enclosed for the consideration of the U.S. Court of Appeals for the Fourth Circuit in the petition for rehearing was a copy of the Brief in Support of Petition for Writ of Habeas Corpus, filed by counsel Mr. Fred G. Crumpler, Jr., esq. in the District Court below. That germane portions of this Brief have been used to support the position of the petitioner in this Court.

E. That the United States Court of Appeals, entered an ORDER on February 9, 1973, in which the status of the petitioner as to indigency was clarified, and the MEMORANDUM DECISION of January 24, 1973 was amended to delete the notation that leave to proceed in forma pauperis was granted. See copy of ORDER (A–17).

F. That the United States Court of Appeals, entered an ORDER on March 5, 1973, in which it was stated:

> "...Upon careful consideration of the appellant's petition for rehearing, with the concurrence of Judge Haynsworth and Judge Sobeloff, the petition is denied."

See Copy of Order attached as Appendices Page A–18.

G. Thus the applying in this Court for writ of certiorari to review the denial of relief in this cause by the United States Court of Appeals for the Fourth Circuit, is the proper and next step for the petitioner in securing review in this matter.

REASONS FOR THE GRANTMENT OF WRIT OF CERTIORARI BY THIS COURT:

ARGUMENT No. I.

THE ISSUANCE OF THE CERTIFICATE OF PROBABLE CAUSE BY THE DISTRICT COURT BELOW, ENTITLED THE PETITIONER ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, TO MORE THAN THE SUMMARY DENIAL AND DISMISSAL GIVEN TO HIM BY THAT COURT BASED UPON THE REASONS STATED BY THE DISTRICT COURT IN ITS DENIAL OF HABEAS RELIEF'

It is clear that after application by the petitioner to the District Court below, that Judge Gordon, issued and granted to the petitioner a certificate of probable cause to appeal. That a certificate of probable cause to appeal is issued only if there is substantial question of law for court of appeals to review. UNITED STATES ex rel. SIEGAL v. FOLLETTE, D.C. N.Y. 1968, 290 F. Supp. 636. Thus the summary denial and dismissal accorded to the appeal of the petitioner by the United States Court of Appeals was not warranted and such denial and dismissal, was not a proper determination of the merits of the appeal by the Court of Appeals.

It is clear that when a certificate of probable cause to appeal is granted and issued by the District Court below, that the appellate court is obliged to hear the appeal. This Court has recently said:

> "When a district judge grants such a certificate, the court of appeals must grant an appeal..." NOWAKOWSKI v. MARONEY, 386 U.S. 542, 543 (1967) in accord: CARAFAS v. LaVALLEE, 391 U.S. 234, 241 (1968)

The petitioner-appellant must be given "an opportunity to address the underlying merits "GARRISON v. PATTERSON, 391 U.S. 464, 466 (1968).

It is clear that from the MEMORANDUM DECISION, entered in this cause on January 24, 1973, that the petitioner was not given any consideration on the merits by the Court of Appeals. In that it recites two errors of facts therein being: "Accordingly, although leave to proceed in forma pauperis is granted (A–10) which was amended and deleted by the ORDER of February 9, 1973 (A–17) and "a certificate of probable cause to appeal is denied," which is in direct contradiction to the face of the record on appeal, which shows that probable cause to appeal was granted and issued by the District Court below on December 29, 1971 (A–9). That it is then recited that the appeal is dismissed for the reasons stated by the district court. This would appear to be a contradiction in that the District Court below, by the issuance of the certificate of probable cause to appeal had stated that there was a substantial question of law for the court of appeals to review in this matter.

That it is clear that this petitioner was not given proper and adequate review in the Court of Appeals in the appeal in this matter, and that a determination of the appeal was not reached on its merits after the issuance and grantment of a certificate of probable cause to appeal by the District Court below. It might have been inadvertence that this was done in the first place, but when the petitioner pointed out the errors in his petition for rehearing, he was entitled to a determination of his appeal on the merits, which he was not given. It is submitted that the petitioner is entitled to a reversal of the Memorandum Decision (A–10) and the Order (A–18) and the setting of this appeal upon remand for a full determination upon the merits by the United States Court of Appeals for the Fourth Circuit, as stated in NOWAKOWSKI, CARAFAS and GARRISON.

ARGUMENT No. II.

ROBERT E. PORTH WAS DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE TRIAL JUDGE DID NOT EXERCISE CARE SUFFICIENT TO PROTECT PORTH'S

CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL, IN PARTICULAR, THE FEDERAL COURTS HAVE REPEATEDLY HELD THAT THE TRIAL JUDGE IS UNDER AN AFFIRMATIVE DUTY TO SHIELD THE ACCUSED FROM THE PREJUDICIAL EFFECTS OF MASSIVE, ADVERSE PUBLICITY.

LAW

Since the landmark decision in SHEPPARD v. MAXWELL, 384 U.S. 333, 16 L.Ed. 2d 600, 86 S. Ct. 1507 (1966), the federal courts have been called upon to hear countless cases concerning pretrial publicity in criminal cases. Exhaustive examination of these cases indicates that each case must be measured on its own merits against the constitutional standards of due process and a fair and impartial trial.

Although the judicial concept of what constitutes a fair and impartial trial has undergone a considerable metamorphosis in recent years, the basic notion, as stated in PATTERSON v. STATE OF COLORADO, 205 U.S. 454, 462, 27 S. Ct. 556, 558, 51 L. Ed. 879 (1970), remains constant:

> "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

The SHEPPARD case, *supra*, along with ESTES v. STATE OF TEXAS, 381 U.S. 532, 85 S. Ct. 1682, 14 L. Ed. 2d 543 (1965), and IRVIN v. DOWD, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961), are the bulwarks in support of the accused's constitutional guarantee of a fair and impartial trial. It should be noted that in SHEPPARD, the accused complained of prejudicial publicity, occurring both before *and* during his trial. The case at bar may be distinguished in that we are concerned only with publicity which accumulated prior to Mr. Porth's trial. Nevertheless, the extent and effect of the pretrial

publicity in both cases is equally clear: massive and pervasive publicity prejudiced the accused's right to a fair and impartial trial.

In SHEPPARD, *supra*, the Supreme Court of the United States stated (see 16 L. Ed. 2d 600, 613):

> "...(T) he Court has also pointed out that '(l) egal trials are not like elections, to be won through the use of the meeting-hall, the radio and the newspaper.' (Citation omitted.) And the Court has insisted that no one be punished for a crime without 'a charge fairly made and freely tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power.' (Citation omitted.) 'Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.' (Citation omitted.) But it must not be allowed to divert the trial from the 'very purpose of a court system . . to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures.' (Citation omitted.) Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources. Thus, in MARSHALL v. UNITED STATES, 360 U.S. 310, 3 L. Ed. 2d 1250, 795 Ct. 1171 (1959), we set aside a federal conviction where the jurors were exposed 'through news accounts' to *information that was not admitted at trial.*
>
> We held that the prejudice from such material 'may indeed be greater' than when it is part of the prosecution's evidence 'for it is then not tempered by protective procedures.' At 313, 3 L. Ed. 2d at 1252. At the same time, we did not consider dispositive the statement of each juror 'that he would not be influenced by news articles, that he could decide the case only on the evidence of record, and that he felt no prejudice against petitioner as a result of the articles.' At 312, 3 L. Ed 2d

at 1252. Likewise, in IRVIN v. DOWD, 366 U.S. 717, 6 L. Ed 2d 751, 81 S. Ct. 1639 (1961), even though each juror indicated that he could render an impartial verdict despite exposure to prejudicial newspaper articles, we set aside the conviction holding:

> 'With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion...' At 728, 6 L. Ed 2d at 759.

Moreover, 'the burden of showing essential unfairness... as demonstrable reality,' (Citation omitted), need not be undertaken when television has exposed the community 'repeatedly and in depth to the spectacle of (the accused) personally confessing in detail to the crimes with which he was later to be charged...'

Only last term in ESTES v. TEXAS, (Citation omitted), we set aside a conviction despite the absence of any showing of prejudice. We said there:

> 'It is true that in most cases involving claims of due process deprivations we require a showing of identifiable prejudice to the accused. Nevertheless, at times a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process.' At 542-543, 14 L. Ed. 2d at 550.
>
> And we cited with approval the language of Mr. Justice Black for the Court in IN RE MURCHISON (Citation omitted), that 'our system of law has always endeavored to prevent even the probability of unfairness.' " (Emphasis added.)

The quotation from the SHEPPARD opinion is lengthy and intentionally so, since it contains the Supreme Court's own guidelines for determining whether a fair and impartial trial has been secured. Succinctly stated, these principles are: (a) Guilt

must be adjudged from evidence presented in the atmosphere of a neutral courtroom; (2) Pretrial publicity of alleged facts, incompetent as evidence, may be especially prejudicial; (3) Jurors may be prejudiced even though indicating impartiality; (4) The accused need not always show prejudice present in the publicity; and (5) The accused is to be shielded, not only from actual unfairness, but from *probable* unfairness.

In SHEPPARD, both favorable and unfavorable articles concerning his wife's death, appeared routinely in the Cleveland newspapers. Sheppard was denied a change of venue, and his jury was not sequestered. In ESTES, the accused was granted a change of venue, even though the pretrial publicity was not nearly as extensive as in SHEPPARD. Yet, the Court found a denial of due process of law in both cases.

In the Porth case, publicity concerning his wife's death appeared almost continuously from the date of his wife's disappearance until the time of his trial. The community was saturated with newspaper articles and radio and television broadcasts concerning the case. Porth was denied a change of venue, despite the extensive publicity preceding his trial.

UNITED STATES v. COTTON, _____ _____ (E.D.Wis. 1969), demonstrates just how far the federal courts will go in shielding the accused from pretrial publicity. In COTTON, a number of defendants were charged with destruction of selective service records. Extensive news coverage centered on the defendants up to the time of their trial. After conducting a voir dire, in which nearly all the jurors admitted being familiar with the case, the court dismissed the action.

A revealing discussion of the court's opinion appears in 1970 Wisc. L. Rev. 209, where the author states, at 211 (footnotes omitted):

> "In dismissing the charges the court indicated there were three ways to guarantee a fair trial in the face of prejudice created by widespread, hostile publicity in the

community: change of venue, continuance, or elimination of the prejudiced jurors through voir dire examination. The court found that change of venue and continuance clashed with the defendants' right to a speedy trial in the district where the alleged offenses were committed. Because these rights have a constitutional basis, the court felt that they could be waived only by motion of the defendants. Since the defendants had declined to do so, and since voir dire had failed to produce an impartial jury, the court considered dismissal to be the only appropriate remedy.

In concluding that the community prejudice in Milwaukee prevented a fair trial in the district at that time, the court did not consider the source of publicity relevant. Whatever the source, the effect on potential jurors was the significant factor. Thus any contribution to the publicity by the defendants was irrelevant to the motion to dismiss."

The author continues, at page 213:

"The court's conclusion in COTTON – that the voir dire examination had indicated that a fair trial was not possible at that time – rests on firm ground. First, recent Supreme Court decisions have recognized that a prospective juror's prejudice may be assumed under certain circumstances. In MARSHALL v. UNITED STATES exposure to portentious, but inadmissible, evidence was considered grounds for dismissing a prospective juror for prejudice. Under the MARSHALL rule, no further inquiry is necessary to determine whether the juror can set aside the impression of such exposure once he admits knowledge of it. In COTTON, the prior convictions may well have constituted such portentious, albeit inadmissible, evidence. As a result, a substantial majority of the jurors had been exposed and were properly disqualified. Second, extensive pub-

licity from litigation could make a subsequent fair trial for the same acts impossible because of a continuing pattern of deep community prejudice. COTTON, perhaps, speaks more forcefully for this proposition, since the federal trial immediately followed the state proceedings. The prejudice could not have dissipated significantly in that short interim. Third, the Court proceeded to voir dire examination before deciding that community prejudice prevented a fair trial. Consequently, it was consistent with the line of cases indicating that such a determination cannot be made prior to voir dire. Last, it was entirely within the court's discretion to dismiss the case for apparent prejudice. The juror's subjective opinion of his prejudice is not conclusive; ultimately it is the responsibility of the court to decide whether he is prejudiced. This wide discretion made the disposition appropriate in light of deep community prejudice."

The principles enumerated by the United States Supreme Court in MARSHALL v. UNITED STATES, 360 U.S. 310 (1959) are of special significance when applied to the case of Mr. Porth. In MARSHALL, the defendant was accused of unlawfully dispensing certain drugs without a prescription. The trial judge refused to allow the Government to introduce evidence of the fact that the defendant had previously been convicted on two similar charges.

However, some, but not all of the jurors admitted reading newspaper articles concerning Marshall's prior record. Nevertheless, upon examination by the trial judge, all indicated the articles would not prejudice them against the accused. Marshall was convicted.

Reversing the conviction, in a *per curium* opinion, the Supreme Court stated, at page 312:

"The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. HOLT v. UNITED STATES, 218 U.S. 245, 251. Generalizations beyond

that statement are not profitable, because each case must turn on its special facts. We have here the exposure of jurors to information of a character which the trial judge ruled was so prejudicial it could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. CF. MICHELSON v. UNITED STATES, 335 U.S. 469, 475. It may indeed be greater for it is then not tempered by protective procedures."

In Porth's case, the local news media repeatedly made reference to information which could not be directly offered as evidence. The frequent reports emphasizing the unusual circumstances of Mrs. Porth's death, and further, attempting to hold Mr. Porth responsible, not only for her death, but for the death of their daughter, were extremely damaging. Such alleged facts and statements could not be properly offered as evidence. Yet, to the further prejudice of Mr. Porth, the trial court allowed some testimony concerning these matters, thereby reinforcing the adverse affects of the publicity. At neither time, however, was Mr. Porth required or allowed to defend himself regarding these allegations.

In MARSHALL, the accused faced a rather brief jail sentence; in Porth's case, the accused faced possible death, and ultimately received life imprisonment. As in MARSHALL, we have here exposure of the jurors to information incompetent as evidence. Mr. Porth is entitled to receive at least the same protection from prejudicial publicity as did Mr. Marshall, in view of the relative severity of the offenses charged. In the light of the MARSHALL decision, it seems manifest that Mr. Porth is entitled to a new trial.

In the Porth case, the trial Court denied the defendant's motion for change of venue prior to the conducting of voir dire. The voir dire revealed that most of the jurors were familiar with

the Porth matter. In this respect, it should be remembered that the Supreme Court has held, in IRVIN v. DOWD, *supra*, that the court may disregard prospective jurors' assurances of impartiality. In DELANEY v. UNITED STATES, 199 F 2d. 107 (1st Cir. 1952), the Court stated:

> "One cannot assume that the average juror is so endowed with a sense of detachment, so clear is his introspective perception of his own mental processes, that he may confidently exclude even the unconscious influence of his preconceptions as to probable guilt, engendered by a pervasive pretrial publicity."

The publicity in the Porth case, as alleged in his petition, was inflammatory and prejudicial in that it repeatedly emphasized and sensationalized Mrs. Porth's death; further, the publicity strongly insinuated that Mr. Porth was responsible for the death of his daughter; and finally, the publicity continually stressed and sensationalized the relationship between Mr. Porth and Nancy Johnson Counts.

An exhaustive annotation on pretrial publicity and a fair trial may be found 10 L. Ed 1243. The annotation cites UNITED STATES ex. rel. SHEFFIELD v. WALLER (1954, D.C. La.) 126 F. Supp. 537, certificate den. (C.A.5), 224 F 2d 280, cert. den. 350 U.S. 922, 100 L. Ed 807, 76 S. Ct. 217, where the court awarded a new trial due to the effects of pretrial publicity. The court noted that the crime occurred in a small town wherein it received prominent publicity. Although the defendant in that case was tried very shortly after his arrest, unlike Mr. Porth, the Porth case is very similar in that Porth's trial also took place in a relatively small community, and was unquestionably the target of a relentless barrage of publicity.

Particularly prejudicial to the defendant's case were the repeated references by the press and other news media to the death of Mr. Porth's daughter. The prejudice inherent in this publicity was recognized by the Supreme Court of North

Carolina in its first opinion concerning the Porth appeal. This constituted so flagrant an abuse of his constitutional right to a fair and impartial trial as to warrant by itself a change of venue.

The trial court erred in not granting this change of venue or a special venire. The cost and inconvenience to the State were woefully small in comparison with the burden placed upon Mr. Porth of facing trial before a jury which could not fairly and impartially decide the charges levied against him. A man's life was, and still is at stake here, a man who has now served nearly five years in prison. At the very least, the trial court should have awarded Porth a change of venue or a special venire in order to protect his constitutional right to a fair and impartial trial. The Supreme Court of North Carolina likewise erred in failing to overrule the trial court's decision and grant a new trial. The Constitution *guarantees* the right to a fair and impartial trial. Where a substantial probability of prejudice is present, where there is any doubt as to the potential fairness of a trial, the doubt should be resolved in favor of the accused. Otherwise, the constitutional guarantee is virtually meaningless.

Due to the increasing frequency with which prejudicial publicity is cited by habeas corpus petitioners as grounds for federal review, it would be superfluous to review here the numerous decisions following and distinguishing SHEPHARD. The principles enumerated by the Supreme Court of the United States are now well-established. It is in their application to the facts of a particular case that difficulties arise. A careful perusal of the circumstances preceding Mr. Porth's trial indicates clearly that he was forced to stand trial before a jury composed of citizens who could not escape the prejudicial effects of extensive pretrial publicity on matters incompetent as evidence in a court of law. The case of MARSHALL v. UNITED STATES, discussed *supra*, lends further support to Mr. Porth's contention that the pretrial publicity involved here prevented him from obtaining a fair and impartial trial.

In weighing the merits of Mr. Porth's contentions against the guidelines set out in SHEPHARD, we find the following:

(1) Mr. Porth's guilt was not determined solely from evidence presented in the atmosphere of a neutral courtroom. Rather, Mr. Porth was tried in an atmosphere which reflected the prejudices and adverse sentiments of individuals who had read and heard numerous alleged facts concerning Mr. Porth which would be incompetent in a court of law.

(2) Pretrial publicity linking Mrs. Porth's death with the death of her daughter was extremely prejudicial. Such publicity, without question, would be incompetent as evidence.

(3) The jurors could not reasonably be expected to erase the prejudicial influence of such pretrial publicity, even though they indicated impartiality.

(4) Mr. Porth has demonstrated the prejudice present in the publicity. Even in the absence of such a showing, he would be entitled to a new trial due to the extraordinary quantity and nature of the publicity preceding his trial.

(5) The test of time reveals that Mr. Porth was tried, not in an atmosphere of probable unfairness, but rather actual unfairness. The trial judge, however, should have recognized the *probable* unfairness which Mr. Porth faced. A change of venue or a special venire would have protected Mr. Porth from this inherent unfairness.

In short, by denying Mr. Porth's motion for a change of venue, the trial court deprived him of his constitutional guarantee to a fair and impartial trial.

ARGUMENT No. III.

ROBERT E. PORTH WAS DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE STATE'S PRIMARY WITNESS TESTIFIED WHILE IN FEAR OF BEING ARRESTED, AND HAS SUBSEQUENTLY REPUDIATED HER TESTIMONY.

LAW

Nancy Johnson Counts was the State's key witness at Mr. Porth's trial. Without her damaging testimony, Mr. Porth

could not have been convicted of first degree murder. Ordinarily, the granting of a new trial on the basis of the repudiation of testimony by a witness as newly discovered evidence is governed by the rules set out by the North Carolina Supreme Court in STATE v. CASEY, 201 N.C. 620, 161 S.E. 81 (1931): The defendant's written affidavit must show:

1. A witness will give newly discovered evidence;

2. Such newly discovered evidence is probably true;

3. Such evidence is competent, material and relevant;

4. Due diligence and proper means were used to procure the testimony at trial;

5. Such evidence is not merely cumulative;

6. Such evidence does not tend only to contradict a former witness or to impeach or discredit him.

However, in Mr. Porth's case, Mrs. Counts' repudiation of her own testimony should be governed by the precedent established in STATE v. ELLERS, 234 N.C. 42, 65 S.E. 2d 503 (1951). In ELLERS, the State's primary witness repudiated his own testimony. In reversing the defendant's conviction, The Court stated, at page 45:

> "This evidence did not merely tend to contradict a former witness or to impeach or discredit him, STATE v. CASEY, 201, N.C. 620, 161, S.E. 81, but it was a repudiation of his own testimony, without which the State did not offer sufficient evidence to support a conviction of the crime of receiving. Therefore, the decisions ordinarily applicable to newly discovered evidence will not be held as controlling upon a factual situation like that disclosed by the present record."

Mrs. Counts has repudiated her own testimony at the trial. Without her testimony, the State cannot prove either motive or premeditation on the part of Mr. Porth. The ELLERS decision is controlling here, and entitles Mr. Porth to a new trial on the basis of the newly discovered evidence.

ARGUMENT No. IV.

ROBERT E. PORTH WAS DENIED A FAIR AND IMPARTIAL TRIAL BY REASON OF THE FACT THAT TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER WAS ERRONEOUSLY ADMITTED INTO EVIDENCE.

LAW

As alleged in the petition for habeas corpus, Robert E. Porth's trial was prejudiced by allowing the solicitor to question Porth's son in regard to the death of Porth's daughter. The Supreme Court of North Carolina recognized the prejudice of this like of questioning in its first opinion, which it subsequently recalled.

In writing its first opinion, the Supreme Court was obviously under the impression that the trial court had instructed the jury in regard to these improper questions, thereby curing the error. Such was not the case, and upon so discovering, the Supreme Court recalled its original opinion and issued another.

The Supreme Court apparently has the power to correct an *error of fact* after a decision has been rendered in a criminal case according to STATE v. MARSH, 134 N.C. 184 (1903). In a very powerful and lengthy dissent, however, Justice Walker warns that this rule should be used with great caution. At page 200, he states:

> "In SIBBALD v. UNITED STATES, 12 Peters, 492, the Court says: 'No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decressor judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes (in the appellate court), or to reinstate a cause dismissed by mistake, fron which it follows that no change or modification can be made which may substantially vary or affect it in any material thing.' "

Robert E. Porth's appellate brief clearly indicates that the proposed instructions should have been given by the trial court. The Supreme Court was without authority to change its opinion after discovering the proposed instructions were never heard by the jury. Rather the Supreme Court should have granted a new trial on the basis of these prejudicial questions, since the modification of its opinion had a most substantial affect on the fate of Mr. Porth.

The adverse affect of the solicitor's questions concerning the death of Mr. Porth's daughter cannot be doubted. The solicitor's remarks merely served to reinforce what the jurors had previously read and heard by means of the news media prior to the trial. Mr. Porth has never been afforded the opportunity for a constitutionally fair trial, free from the prejudice of such incompetent evidence. These constitutional guarantees should be extended to Mr. Porth immediately by awarding him a new trial.

ARGUMENT No. V.

ROBERT E. PORTH WAS DENIED A FAIR AND IMPARTIAL TRIAL BY REASON OF THE FACT THAT THE TRIAL COURT PERMITTED TESTIMONY CONCERNING AN AUTOPSY WHICH WAS PERFORMED ON MRS. PORTH FIVE MONTHS AFTER HER DEATH WITHOUT A SHOWING AS TO TREATMENT OF THE BODY IN THE INTERIM.

LAW

40 C.J.S. *Homicide* S 257 (b), states, at page 1204:

> "...The fact that a post-mortem examination was made long after death is no reason in itself for its exclusion as evidence, if the body was in such a state of preservation that the jury could judge whether its condition was caused by injuries inflicted before or after death..."

Petitioner can find no case specifically providing that evidence concerning the handling of the body prior to performance of an autopsy is an absolute prerequisite before permitting

testimony of the doctor who examined the body. Nonetheless, common sense and sound medical reasoning lead inescapably to the conclusion that the trial judge should have required evidence of the manner in which Mrs. Porth's body was handled, transported, and interred before allowing Dr. Geoffrey Mann to testify.

The testimony of Dr. Mann was crucial to the State's case against Mr. Porth. Dr. Fox, who performed the original autopsy on Mrs. Porth, found no traces of internal injuries, as did Dr. Mann five months later. Yet, Dr. Mann was allowed to testify, that in his opinion, the injuries he discovered could not have been caused by a fall down a stairway of four steps, as Mr. Porth had claimed. He did not, however, negate the possibility that the injuries which he discovered occurred as the result of mishandling during shipment of her body from Virginia to Wisconsin, and subsequent interment for a period of five months.

The jury, therefore, was not in a position to fairly judge whether the condition of Mrs. Porth's body was caused by injuries inflicted before or after death. Instead, the jury was left free to speculate as to when the injuries occurred. By allowing such evidence, the Court in effect saddled Mr. Porth with the burden of proving that the injuries which Dr. Mann allegedly found were not the result of his wife's fall. A criminal defendant is presumed to be innocent, and is constitutionally entitled to have the state prove each and every essential element of the crime charged beyond a reasonable doubt.

It is respectfully submitted that the court should allow Mr. Porth the benefit of a constitutionally fair trial, wherein the presumption of innocence surrounds him at each and every stage of the proceeding, and the burden of disproving incompetent evidence is not placed upon him. The testimony of Dr. Mann, when coupled with the prejudice inherent in the minds of the jurors as the result of the pretrial publicity, only served to add fuel to the fire and inflame the passions of the jurors.

ARGUMENT No. VI.

ROBERT E. PORTH IS ENTITLED TO A HEARING ON HIS PETITION FOR HABEAS CORPUS.

LAW

In TOWNSEND v. SAIN, 377 U.S. 293, 318 (1963), the Supreme Court enumerated the circumstances in which a petitioner has a right to a hearing:

(1) the merits of the factual dispute were not resolved in the state hearing;

(2) the state factual determination is not fairly supported by the record as a whole;

(3) the fact finding procedure employed by the state court was not adequate to afford a full and fair hearing;

(4) there is a substantial allegation of newly discovered evidence;

(5) the material facts were not adequately developed at the state-court hearing; or

(6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

The petition of Robert E. Porth establishes that he has been denied a fair factual hearing in the state courts. The state courts failed to take into full account the full impact of the pretrial publicity, particularly the publication of information which was incompetent as evidence. Moreover, the petitioner has made a substantial allegation of newly discovered evidence. Therefore, it is respectfully submitted that Mr. Porth should be awarded a hearing on his petition for a writ of habeas corpus.

CONCLUSION

ISSUE NO. I.

It is respectfully submitted, that the petitioner, upon the issuance of the certificate of probable cause to appeal by the District Court Judge, that had denied him habeas corpus relief, that he was entitled to more than was accorded to him in this case, as the issuance of the certificate of probable cause to appeal by the District Court, certified that there were in the case issues of law, that needed decision by the Court of Appeals, and the affirmance of and dismissal of the appeal on the basis of the District Court reasons, is clearly not an adjudication on the merits by the Court of Appeals. That the petitioner is entitled to a reversal of the Court of Appeals and the remanding of this cause on the basis of this issue for a determination of this appeal on the merits by the Court of Appeals.

ISSUE NO. II.

It is respectfully submitted, that the petitioner, was denied a fair trial by the prejudicial effects of massive, adverse pre-trial and trial publicity in the case. See the standards recommended by the American Bar Association on pre-trial publicity and the standards relating to fair trial and free press. At the very least, the trial court should have awarded Porth a change of venue or a special venire in order to protect his constitutional right to a fair and impartial trial. Where as in this case, a substantial probability of prejudice is present, there is any doubt as to the potential fairness of a trial, the doubt should be resolved in favor of the accused. Otherwise the constitutional guarantee is virtually meaningless. In short, by denying Mr. Porth's motion for a change of venue, the trial court deprived him of his constitutional guarantee of and right to a fair and impartial trial. It is clear that the Court of Appeals decision in this matter should be reversed and the matter remanded for the grantment of a new trial to the petitioner.

ISSUE NO. III

It is respectfully submitted that the petitioner was denied a fair trial by reason of the fact that the State's primary witness testified while in fear of being arrested, and has subsequently repudiated her trial testimony. The District Court in its denial on this point seems to stress the fact that the affidavit was in the possession of counsel for petitioner during the pendency of the direct appeal taken in this matter to the Supreme Court of North Carolina. That this is not correct as it is clear that the Supreme Court of North Carolina in criminal matters, will not hear newly discovered evidence upon a motion for a new trial based on such. And that such newly discovered evidence has to be brought out in the Superior Court. It is respectfully submitted that this witness's trial testimony played a very large role in securing the conviction of this petitioner for first degree murder, and that her recantation of her trial testimony, should be given more weight than it has been in this cause. That it is respectfully submitted, that upon the basis of the affidavit which has not been contraverted, the petitioner is entitled to a reversal of the denials accorded in this case, and a remand for the grandment of a new trial in this matter.

ISSUE NO. IV.

It is respectfully submitted that Robert E. Porth was denied a fair and impartial trial by the reason of the fact of testimony concerning the death of his daughter being erroneously admitted into evidence at the trial. Robert E. Porth's appellate brief in the Supreme Court of N.C. clearly indicates that the proposed instruction should have been given by the trial court, which was not done. The Supreme Court of N.C. was without authority to change its opinion after discovering that these improper questions were not cured by an instruction of the trial court as the instructions were never heard by the trial jury. Rather the N.C. Supreme Court should have granted a new trial on the basis of these prejudicial questions, since the modification of its opinion had a most substantial affect on the fate of the

petitioner. The adverse affect of the solicitor's questions concerning the death of Mr. Porth's daughter cannot be doubted. The solicitor's remarks merely served to reinforce what the jurors had previously read and heard by means of the news media prior to the trial. Mr. Porth has never been afforded the opportunity for a constitutionally fair trial, free from the prejudice of such incompetent evidence. These constitutional guarantees should be extended to Mr. Porth immediately awarding him a new trial. Thus it is submitted that the denial of relief below should be reversed and this cause remanded for the grantment of a new trial for the petitioner.

ISSUE NO. V.

It is respectfully submitted that the facts in this case show that the petitioner was denied a fair and impartial trial in the trial court by the permitting of testimony concerning an autopsy which was performed on Mrs. Porth five months after her death without a showing as to treatment of the body in the interim. That the first autopsy performed in this matter found the cause of death "undetermined," it stands to reason that this finding should have prevailed in the absence of a showing as to the treatment of the body during the interim between the two autopsies. Dr. Mann's testimony coupled with the massive pre-trial and trial publicity in this case, deprived this petitioner of his constitutional right to a fair and impartial trial, and that the denials of relief in the Courts below should be reversed by this Court, and this cause remanded for the grantment of a new trial to the petitioner.

ISSUE NO. VI.

It is submitted that the petitioner was entitled to by the District Court, of the holding of a full and fair evidentiary hearing in this matter. That this is especially apparent since the District Court after the denial of habeas corpus relief in this cause, granted and issued a certificate of probable cause to appeal in this matter to the United States Court of Appeals below. That the petition of writ of habeas corpus filed by the

petitioner in the District Court below establishes that he was not given a fair, factual hearing in the state courts. Thus he was entitled to a full and fair evidentiary hearing in the District Court below. The denials accorded to the petitioner in the Courts below was not on the merits and should be reversed by this Court and this cause remanded for such proceedings as this Court decrees.

Therefore, in concluding, the language in STATE v. CHRISTIE, 221 A. 2d 20, 23 (N.J.), is most appropriate:

> "WHILE SOME OF THE TRIAL ERRORS HEREIN, STANDING ALONE, MAY NOT HAVE BEEN SUFFICIENT TO WARRANT A REVERSAL OF CONVICTION, WE ARE SATISFIED THAT IN THEIR TOTALITY THERE WAS A MANIFEST DENIAL OF JUSTICE." (Capitalization by petitioner).

WHEREFORE, for the herein stated reasons as support by the Record, it is respectfully Moved and Prayed, that this Court will grant and issue in the behalf of the petitioner a writ of certiorari in such form and manner as the Court may direct to the end, that the MEMORANDUM DECISION and ORDER entered in this cause in the United States Court of Appeals for the Fourth Circuit on January 24, 1973 and March 5, 1973, respectively, may be reviewed and the judgments of the United States Court of Appeals for the Fourth Circuit in these matters, be reversed, and this Court remanded to that Court or the Dis-

trict Court as decided by the Court, for the grantment to the relief, that this Court finds that the petitioner is entitled to upon a determination of the merits of this cause.

Respectfully sumbitted,

ROBERT E. PORTH,
Petitioner pro se
In propria persona

May 23, 1973.

Central Prison
835 West Morgan Street
Raleigh, N. C. 27603

STATE OF NORTH CAROLINA)
) ss.: VERIFICATION
COUNTY OF WAKE)

ROBERT E. PORTH, being first duly sworn on oath, represents that he has subscribed to the above and states that the information contained therein is true and correct to the best of his knowlege and belief.

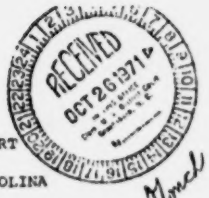
Sworn to and subscribed before me

ROBERT E. PORTH
Affiant

This_____day of_____, 1973.

_____
NOTARY PUBLIC

_____



IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

ROBERT E. PORTH, Petitioner	)	
v.	)	NO. C-300-G-70
WARDEN OF THE STATE PENITENTIARY OF THE STATE OF NORTH CAROLINA, Respondent	)	

MEMORANDUM OPINION AND ORDER

GORDON, District Judge

Robert E. Porth, represented by counsel, is a state prisoner who has submitted for filing in this Court a petition for a writ of habeas corpus. In February, 1966, the petitioner was found guilty by a jury of first degree murder of his wife, and pursuant to the jury's recommendation of mercy, he was sentenced to the State Penitentiary for the term of his natural life. His conviction was affirmed by the North Carolina Supreme Court in State v. Porth, 269 N. C. 329, 153 S. E. 2d 10 (1967). On February 23 and 24, 1970, the petitioner received a post-conviction hearing in the Forsyth County Superior Court. The Honorable J. William Copeland, who presided over the hearing, denied relief. A subsequent petition for a writ of certiorari to the North Carolina Court of Appeals was denied.

First, the petitioner alleges that he was denied a fair trial because of the prejudicial pre-trial publicity concerning his case. Publicity and the activities of the press during the trial is not at issue. After a careful review of the post-conviction hearing transcript and copies of numerous newspaper articles which were before the post-conviction court, the Court concludes that the petitioner was accorded a full and fair hearing by the post-conviction court on this point, and in accordance with Townsend v. Sain, 372 U. S. 293, 9 L. Ed. 2d 770, 83 S. Ct. 745 (1963), adopts the following findings of fact of that court:

> "7. That from August 17, 1965, until October 12, 1965, numerous articles pertaining to this case appeared in both newspapers published in Winston-Salem. That both papers were owned at that time by the same company, and that both of these newspapers are in general circulation in the City of Winston-Salem and Forsyth County.
>
> "8. That during this period of time approximately fifty articles appeared in these newspapers in various parts of the papers; both front, middle and back.
>
> "9. That the newspaper articles that were published during this period of time presented the matter fairly so far as the State was concerned and so far as the defendant was concerned, and that in many of these articles and in the headlines the innocence of the defendant was emphasized equally with anything else that was printed, and that at all times the news media made a special effort to point out the contention of the defendant; that he was innocent of any crime.
>
> "10. That from October 12, 1965, until the date of the trial, commencing February 14, 1966, there appeared a number of other articles printed from time to time concerning this case, and that

in each of these there was printed in various parts of the above two newspapers the contention of the defendant that he was innocent of any crime and this contention was at all times equally presented with any other news story on the subject.

"11. That under date of September 23, 1965, and filed October 12, 1965, the defendant filed a motion that the cause be removed to, or that a jury be drawn from, another county as provided in General Statute 1-84 and General Statute 1-86 on the ground the charge had been given such widespread and such unfavorable publicity that it would be impossible for the defendant to obtain a fair trial in Winston-Salem or before a Forsyth County jury.

* * * *

"At the conclusion of the hearing, Honorable Eugene G. Shaw, Judge Presiding, made the finding that the defendant could obtain a fair and impartial trial in Forsyth County and denied the motion.

"12. That some time prior to the trial there was a newspaper article printed in one of the Winston-Salem papers that had something to say about a daughter of the defendant having received arsenic poisoning.

"13. That employed counsel, Mr. James J. Booker, proceeded to prepare his case for trial and that in so doing he cautioned the petitioner at all times against making any statement to any newspaper or anybody else pertaining to this case.

* * * *

"16. That the case came on for trial at the February 14, 1966, Criminal Session of the Superior Court for Forsyth County with the Honorable George M. Fountain, Judge Presiding.

"17. That one-hundred and nine jurors were examined before a jury of twelve and two alternates were seated. That during this examination which took place over a period of three days the State of North Carolina peremptorily challenged six jurors and that the defendant peremptorily challenged twelve jurors of the jury panel and peremptorily challenged others

when the alternate jurors were selected. That petitioner did not exhaust his peremptory challenges. That each of the jurors were asked if he or she had an opinion about the guilt or innocence of the petitioner and each of the jurors that were seated replied that he did not have such an opinion.

"18. That from the beginning of that trial until its conclusion the Honorable George M. Fountain, Judge Presiding, would not permit T. V. cameras or picture taking of any kind in the courthouse or upon the grounds, and that no pictures were taken in public.

"19. That before any evidence was received counsel for the petitioner orally moved the Court for a change of venue, for the witnesses to be sequestered, and that the evidence be taken down on a tape recorder and that each of these oral motions by trial counsel for the petitioner was denied. That there was no motion made for a continuance.

* * * *

"21. That the Trial Judge entered an order after the jury had been sworn, chosen and empaneled that they would be sequestered during the course of this trial and this was done until the conclusion of it. That the officers assigned to the trial jury were directed to remove from all newspapers any articles dealing with this case and this was done, and the jurors were advised and directed immediately and at each adjournment not to read anything about this case and not to talk to anyone about it and not to listen on the radio or T. V. about it, and there is no evidence that any of these orders were violated."

As was noted above, the Court has made an independent review of the newspaper articles. These cannot be said to be the type of news reporting and commentary which was termed by the United States Supreme Court in Sheppard v. Maxwell, 284 U. S. 333, 16 L. Ed. 2d 600, 86 S. Ct. 1507 (1966) as "inherently prejudicial publicity which saturated the community." 16 L. Ed. 2d at 621. Of course, any

inquiry into prejudicial pre-trial publicity must focus upon the twelve jurors who are finally selected to determine the facts of the case. In Irvin v. Dowd, 366 U. S. 717, 6 L. Ed. 2d 751, 81 S. Ct. 1639 (1961), Mr. Justice Clark stated:

> "It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in the case." 6 L. Ed. 2d at 756.

During the voir dire of jurors immediately preceding the petitioner's trial, those twelve jurors who were chosen to sit on the case were questioned extensively concerning the pre-trial publicity and the effect that it had made on them. All twelve admitted to reading at least some of the articles concerning the case. However, to the man, all stated that they had formed no opinion as to the guilt or innocence of the petitioner and they assured both the prosecutor and the attorney for the defense that they would make their decision based solely on the evidence presented during the trial.

The question here is whether the pre-trial publicity prejudiced the petitioner's right to a fair trial and an

impartial jury. The mere fact that there was substantial pre-trial publicity is not enough, in and of itself, to give rise to a presumption of prejudice. It is worthy of note in this context that there were articles which tended to invoke a degree of sympathy for the petitioner. The Court concludes that the petitioner's contention is without merit.

Secondly, it is alleged that the petitioner was denied a fair trial because the State's primary witness testified while in fear of being arrested and has subsequently repudiated her testimony. The basis of this allegation is a purported affidavit signed by Nancy Johnson Counts. This affidavit was brought to the attention of the post-conviction court, but was not offered to the North Carolina Supreme Court when the case was on direct appeal, although it was in the possession of the petitioner's counsel when the case was argued before that court. Actually nowhere in the affidavit does she actually repudiate her testimony. Rather, she states that she was under hypnosis or in a state of shock when she testified and she was also in fear of being arrested. She further states a conclusion of law when she says she knows of no facts that would indicate that the petitioner is guilty of first degree murder. A review of the trial transcript shows that at the time the crime was committed, Mrs. Counts was in the State of Florida. Her testimony dealt with her relationship with the petitioner prior to and after the crime was committed

and she was subjected to rigorous cross-examination. The Court concludes that this allegation is without constitutional significance.

Thirdly, the petitioner alleges that testimony concerning the death of petitioner's daughter during his trial for the murder of his wife was erroneously admitted into evidence at his trial. He further contends that the trial court erred in permitting testimony concerning an autopsy which was performed on the wife five months after her death. Both of these allegations are evidentiary in nature.

> "Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. The role of a federal habeas corpus petition is not to serve as an additional appeal." Grundler v. State of North Carolina, 4 Cir., 283 F. 2d 798, 802 (1960).

Accordingly, the Court concludes that these contentions are without merit.

Finally, the petitioner in a pro se amendment to his petition claims that he was prejudiced by the introduction into evidence by the State of a wooden plank which had several small bloodstains on it. The record is unclear whether the prosecuting attorney, at the time he offered the plank into evidence, knew that the blood was not that of the murder victim. However, the petitioner suffered no prejudice thereby, because subsequent testimony conclusively showed that the blood was from a small child and

not from his deceased wife.

O R D E R

Accordingly, IT IS ORDERED that the petition of Robert E. Porth for a writ of habeas corpus be, and the same hereby is, denied.

IT IS FURTHER ORDERED that the Clerk forthwith mail two certified copies of this Memorandum Opinion and Order to the petitioner's attorney, Fred G. Crumpler, Jr., and two certified copies to the Attorney General of the State of North Carolina.

Eugene A. Gordon
United States District Judge

October 21, 1971

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

GREENSBORO DIVISION

ROBERT E. PORTH,)
Appellant)
)
v.) C-300-G-70
)
WARDEN OF THE STATE PENITENTIARY)
OF THE STATE OF NORTH CAROLINA,)
Appellee)

MEMORANDUM ORDER

EUGENE A. GORDON, CHIEF JUDGE

The petitioner, a state court prisoner, filed in this Court on December 16, 1971, an application for a certificate of probable cause to appeal this Court's Memorandum Opinion and Order filed October 26, 1971, denying habeas corpus relief.

The Court is of the opinion that this appeal is not frivolous but taken in good faith and that there exists probable cause to appeal; therefore, a certificate of probable cause is hereby issued; and

IT IS ORDERED that the Clerk of Court forward this Memorandum Order along with pertinent documents to the United States Court of Appeals for the Fourth Circuit pursuant to the provisions of Rule 22(b), Federal Rules of Appellate Procedure.

IT IS FURTHER ORDERED that the Clerk of Court mail a certified copy of this Memorandum Order to the petitioner at his place of confinement and two certified copies to the Attorney General for the State of North Carolina.

Eugene A. Gordon
United States District Judge

A True Copy
Date:
Aaron L. Stuart, Clerk
By: Margaret C. Hamilton
Deputy Clerk

December 27, 1971

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1012

ROBERT E. PORTH,

Appellant,

versus

WARDEN OF THE STATE PENITENTIARY
OF THE STATE OF NORTH CAROLINA,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

MEMORANDUM DECISION

A review of the record and of the district court's opinion discloses that an appeal from the order of the district court refusing habeas corpus relief would be without merit. Accordingly, although leave to proceed in forma pauperis is granted, a certificate of probable cause to appeal is denied and the appeal is dismissed for the reasons stated by the district court.

The Clerk is directed to file with this memorandum decision a copy of the district court's opinion.

Clement F. Haynsworth, Jr.
Chief Judge, Fourth Circuit

United States Circuit Judge

United States Circuit Judge

A True Copy, Test
William K. Slate, II, Clerk
By [signature]
Deputy Clerk

FILED

JAN 24 1973

WILLIAM K. SLATE, II
CLERK

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NO. 72–1012

ROBERT E. PORTH,

Appellant,

versus

WARDEN OF THE STATE PENITENTIARY
OF THE STATE OF NORTH CAROLINA,

Appellee.

PETITION FOR REHEARING

TO: THE HONORABLE CHIEF JUDGE, AND ASSOCIATE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT:

NOW COMES, Robert E. Porth, the appellant, in the above entitled cause, respectfully Moving that pursuant to Rule 40, of the Federal Rules of Appellate Procedure, that he be granted a rehearing in this matter of the denial of relief entered in this cause on January 24, 1973, and as grounds for the grantment of such relief the appellant, shows unto the Court:

1.

That a copy of the MEMORANDUM DECISION, entered in this cause on January 24, 1973, is attached hereto as appendices Page A–3.

2.

That this Petition for Rehearing is being filed in apt time, within 14 days of the entry of the MEMORANDUM DECISION of the Court entered January 24, 1973.

3.

That it would appear to the appellant that the Court has his case mixed up with some other cause, and that the entry of the Memorandum Decision (A–3) was in error, in that:

A. The MEMORANDUM DECISION (A–3) states:

"...a certificate of probable cause to appeal is denied and the appeal is dismissed for the reasons stated by the District Court."

That it is patently clear that the record in this cause was not reviewed thoroughly, as the District Judge below, issued a certificate of probable cause to appeal, thus the same was not sought in this Court, that the attention of the Court is directed to a copy of the Memorandum Order, entered in this cause December 27, 1971 by the Honorable Eugene A. Gordon, United States District Judge (Now chief Judge of the Middle District of N.C.):

"The Court is of the opinion that this appeal is not frivolous but taken in good faith and that there exists probable cause to appeal; therefore, a certificate of probable cause is hereby issued; ..."

That the petitioner alleges upon information and belief, that the certificate of probable cause (A–1) issued in this cause by Judge Gordon, entitled him to more than a summary dismissal by the Court.

B. The MEMORANDUM DECISION (A–3) states:

"...Accordingly, although leave to proceed in forma pauperis is granted..."

That it is clear that this was not a in forma pauperis in that

the appellant paid all costs in the District Court below, and that a $200.00 bond still remains posted in that Court. That as shown on Appendices Page A–2. Receipt No. 40575, issued by the District Court below is for the $5.00 fee for filing Notice of Appeal and for the $25.00 docketing fee in this Court. That Receipt No. 40576 is for $250.00, which is the bond required in this Court and was for that purpose. That the petitioner paid the habeas corpus filing fee, the notice of appeal fee in the District Court and the docketing fee of $25.00 in this Court and posted a $200.00 bond in the District Court below and a bond of $250.00 in this Court, therefore, it is clear that any reference to in forma pauperis, is out of order in this case, and shows that this case was not reviewed properly before it was summarily denied by this Court.

That the petitioner–appellant is attaching to this Petition for Rehearing a copy of the Brief in Support of Petition for Writ of Habeas Corpus, filed by counsel in the District Court below, the said Brief being attached hereto as Appendices Pages A–4–21.

WHEREFORE, for the reasons pointed out herein, it is respectfully Moved and Prayed that the Petition for Rehearing will be granted in this cause, and that a decision of the merits be made of the appeal, and further it is respectfully urged that for the sound reasons set forth in the Brief (A–4–21), that the petitioner is entitled to a reversal of the District Court denial of habeas corpus relief by the District Court, and this cause be remanded back to the District Court for the issuance of the writ of habeas corpus subject to the right of the state to retry the petitioner, if such be the desire of the State.

This the_____day of January, 1973.

/S/_____
ROBERT E. PORTH
Appellant pro se
in propria persona

NORTH CAROLINA)
)
WAKE COUNTY)ss.:

VERIFICATION and CERTIFICATE OF SERVICE

ROBERT E. PORTH, being first duly sworn on oath, represents that he has subscribed to the above, and states that the information contained therein is true and correct to the best of his knowledge and belief, and he further does hereby certify, that a copy of the foregoing Petition for Rehearing, complete with all exhibits to this Court was served upon the counsel for respondents, duly verified by placing it into an envelope addressed: Office of the Attorney General, Justice Building, Post Office Box 629, Raleigh, N.C., and that the said addressed envelope was placed into the United States Mail, for delivery postage prepaid, certified on this the_____day of January, 1973.

/S/ _____
ROBERT E. PORTH
AFFIANT

SWORN TO AND SUBSCRIBED BEFORE ME

THIS_____DAY OF JANUARY, 1973.

_____
NOTARY PUBLIC

_____

AC Form No. 85-Revised
Form approved by
Comp. Gen., U. S.
December 2, 1952

ORIGINAL

RECEIPT FOR PAYMENT

UNITED STATES DISTRICT COURT

FOR THE

MIDDLE DISTRICT OF NORTH CAROLINA

OFFICE OF THE CLERK

RECEIVED FROM Central Prison, Raleigh, N.C.
Prisoners Trust Fund: Robert E. Porth
835 W. Morgan St. Raleigh, NC. 27602

Place

DOC. NO. C-300-B-70 Division DATE 12/29/1981

CASE OR PROCEEDING Robert E. Porth v. Warden of the State Penitentiary of N.C.

ACCOUNT	AMOUNT	ACCOUNT	AMOUNT
Clerk's Filing Fee Appeal	5.00	Registry Cash Bail	
Bankruptcy Filing Fee		Tender	
Referee's Sal. and Exp. Fund			
		Restitution	
Miscl. Earnings Admission of Attorney		Other Moneys Civil Judgment	
Copy-Compare		docketing fee Court of Appeals	25.00
Certificate			
		Fine	
		Naturalization Decl'n Pet'n No.	

Total ➤ 30.00

DEPUTY CLERK Albert L Vaughn

Cash ☐ Check ☑ MONEY ORDER ☐

40575

AO Form No. 82-Revised
Form approved by
Comp. Gen., U. S.
December 2, 1952

ORIGINAL

RECEIPT FOR PAYMENT

UNITED STATES DISTRICT COURT

FOR THE

MIDDLE DISTRICT OF NORTH CAROLINA

OFFICE OF THE CLERK

RECEIVED FROM Central Prison, Raleigh, N.C.
Prisoners Trust Fund: Robert E. Booth
835 W. Morgan St. Raleigh, N.C. 27603

DOC. NO. L.P. 439 Division DATE 12/29/1971

CASE OR PROCEEDING Robert E Booth v. Warden of the State Penitentiary

ACCOUNT	AMOUNT	ACCOUNT	AMOUNT
Clerk's Filing Fee		Registry Cash Bail Appeal	250.00
Bankruptcy Filing Fee		Tender	
Referee's Sal and Exp. Fund		Restitution	
Miscel. Earnings Admission of Attorney		Other Moneys Civil Judgment	
Copy-Compare		Costs	
Certificate		Fine	
		Naturalization Decl'n Pet'n No.	
		Total ▸	250.00

DEPUTY CLERK Mildred K Vaughan Cash ☐ Check ☑ MONEY ORDER

40576

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED

FEB 1973

WILLIAM K. SLATE, II
CLERK

No. 72-1012

Robert Porth,

Appellant,

-versus-

Warden of the State Penitentiary
of the State of North Carolina,

Appellee.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

ORDER

On January 24, 1973, a memorandum decision was filed in this case affirming the decision of the district court. When the opinion was filed the appellant was granted leave to proceed in forma pauperis even though he had previously paid the Clerk's docketing fee. Accordingly, it is ordered that the memorandum decision of January 24, 1973, is amended to delete the notation that leave to proceed in forma pauperis was granted. Chief Judge Haynsworth and Judge Sobeloff concur in this order.

A[illegible], Jr., Clerk

Diane Burte

United States Circuit Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 72-1012

FILED

MAR 5 1973

WILLIAM K. SLATE II
CLERK

ROBERT E. PORTH, Appellant,

versus

WARDEN OF THE STATE PENITENTIARY
OF THE STATE OF NORTH CAROLINA, Appellee.

O R D E R

Upon careful consideration of the appellant's petition for rehearing, with the concurrence of Judge Haynsworth and Judge Sobeloff, the petition is denied.

For the Panel:

United States Circuit Judge

A True Copy, T e s t e:

William K. Slate, II, Clerk

By Sharon [illegible]
Deputy Clerk

CERTIFICATE OF SERVICE

SUPREME COURT OF THE UNITED STATES

NO._____, October Term, 1972

ROBERT E. PORTH,
Petitioner,

vs.

WARDEN OF THE STATE PENITENTIARY
OF NORTH CAROLINA,
Respondent.

I hereby certify that on this 23rd day of May, 1973, three copies of the Petition for Writ of Certiorari were placed into an envelope addressed to counsel of record for respondent, the Attorney General of North Carolina at his stated address of: Office of the Attorney General, N.C. Department of Justice, Box 629, Raleigh, N.C. 27602. That the said addressed envelope containing the three copies of the Petition for Writ of Certiorari, was placed into the United States Mail for postage prepaid delivery to the said Attorney General of North Carolina by certified mail on this date. I further certify that all parties required to be served have been served.

ROBERT E. PORTH
Petitoner pro se
in propria persona

Central Prison
835 West Morgan Street
Raleigh, N. C. 27603

The Clerk is requested to notify counsel-less, petitioner pro se of action of the Court by means of Airmail Letter.

The person to be notified for petitioner is:

Robert E. Porth
Central Prison
835 West Morgan Street
Raleigh, N. C. 27603

IN THE
SUPREME COURT OF THE UNITED STATES
Fall Term, 1972

No. 72-1850

ROBERT E. PORTH,
Petitioner,

v.

WARDEN OF THE STATE PENITENTIARY
OF NORTH CAROLINA,
Respondent.

BRIEF OF RESPONDENT, WARDEN OF THE STATE PENITENTIARY OF NORTH CAROLINA, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion below is an unreported memorandum decision filed January 24, 1973, styled ROBERT E. PORTH v. WARDEN OF THE STATE PENITENTIARY OF THE STATE OF NORTH CAROLINA, No. 72-1012, which affirmed the memorandum opinion and order of United States District Court for the Middle District of North Carolina, Greensboro Division, filed October 21, 1971. A petition to rehear was denied by order of the Court filed March 5, 1973.

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U.S.C.A., 1257(3).

INDEX

TABLE OF AUTHORITIES iii

OPINION BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

ARGUMENT . . . . . .

I. PETITIONER RECEIVED ADEQUATE REVIEW VIA A PERMISSIBLE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE 4th CIRCUIT 5

II. PETITIONER'S TRIAL WAS NOT AFFECTED BY PRETRIAL PUBLICITY SO AS TO HAVE PREVENTED HIM FROM RECEIVING A FAIR TRIAL 6

III. EVIDENCE AGAINST PETITIONER WAS NOT PROCURED BY DURESS, AND PETITIONER'S SHOWING IN THIS REGARD IS INSUFFICIENT TO MERIT HIM RELIEF IN A FEDERAL HABEAS CORPUS PROCEEDING 17

IV. PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER 19

V. PETITIONER WAS NOT REQUIRED TO UNCONSTITUTIONALLY ASSUME THE BURDEN OF PROOF 21

VI. PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS WAS PROPERLY REVIEWED 22

CONCLUSION 22

CERTIFICATE OF SERVICE 24

APPENDIX I 25

APPENDIX II 27

TABLE OF AUTHORITIES

Fay v. Noia,
372 U.S. 391 (1963) 17, 22

Garrison v. Patterson,
391 U.S. 464 (1968) 5

Grundler v. North Carolina,
283 F. 2d 798 (4th Cir. 1960) 21

Johnson v. Zerbst,
304 U.S. 458 (1937) 17

Sidders v. United States,
381 F. 2d 513 (9th Cir. 1967) 21

State v. Faust,
254 N.C. 101, 118 S.E. 2d 769 20

State v. McClain,
240 N.C. 171, 81 S.E. 2d 364 20

Stroble v. California,
343 U.S. 181 (1952) 17

Townsend v. Sain,
377 U.S. 293 (1963) 22

United States v. Milanovich,
303 F. 2d 626 (4th Cir. 1962) 17

United States v. Shipp,
409 F. 2d 33 (4th Cir. 1969) 18

Virgin Islands v. Lake,
362 F. 2d 770 (3rd Cir. 1966) 21

Virgin Islands v. Torres,
161 F. Supp. 699 (DC VI 1958) 21

QUESTIONS PRESENTED

I.

DID PETITIONER RECEIVE AN ADEQUATE AND PROPER APPELLATE REVIEW IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT?

II.

WAS PETITIONER'S CRIME THE SUBJECT OF SUCH PRETRIAL PUBLICITY THAT HE COULD NOT HAVE RECEIVED A FAIR TRIAL?

III.

WAS TESTIMONY AGAINST PETITIONER UNCONSTITUTIONALLY OBTAINED BY DURESS?

IV.

WAS PETITIONER DENIED DUE PROCESS BY TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER?

V.

IS PETITIONER ENTITLED TO A HEARING DE NOVO ON HIS POST-CONVICTION CLAIMS IN FEDERAL COURT?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U. S. CONSTITUTION, AMENDMENT XIV

No state shall . . . deprive any person of life, liberty, or property, without due process of law;

28 U.S.C. §2253. *Appeal.*

In a habeas corpus proceeding before a circuit or district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit where the proceeding is had.

There shall be no right of appeal from such an order in a proceeding to test the validity of a warrant to remove, to another district or place for commitment or trial, a person charged with a criminal offense against the United States, or to test the validity of his detention pending removal proceedings.

An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause.

28 U.S.C. §2254. *State Custody; remedies in federal courts.*

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit--

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

STATEMENT OF THE CASE

Petitioner was tried for and convicted of murder in the first degree in the Superior Court of Forsyth County, North Carolina, in February 1966. His conviction was affirmed on appeal to the

North Carolina Supreme Court, *State v. Porth*, 269 N.C. 329, 153 S.E. 2d 10 (1967). Thereafter, on August 12, 1969, he filed an application for a post-conviction hearing in the Superior Court above, which hearing was held on February 23 and 24, 1970. Relief was denied in a 21 page order filed March 9, 1970. The North Carolina Court of Appeals denied certiorari on June 5, 1970. On December 31, 1970, petitioner applied for a writ of habeas corpus from the United States District Court for the Middle District of North Carolina, which was denied by order of October 26, 1971. It is this latest order petitioner seeks by this application to overturn.

ARGUMENT I

PETITIONER RECEIVED ADEQUATE REVIEW VIA A PERMISSIBLE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE 4th CIRCUIT.

Petitioner first contends that the summary dismissal of his appeal was improper, that he was not given "proper and adequate review" and that a determination on the merits was not made. All are untrue.

First, petitioner received appellate review and a determination on the merits. In the initial order of the United States Court of Appeals for the Fourth Circuit (Application for Cert., p. A9), the first sentence reads "A review of the record and of the district court's opinion discloses that an appeal . . . would be without merit." From this, it is obvious petitioner received both factual and substantial legal review, as the record includes his arguments. It is true that petitioner did not have an oral argument or a formal brief submitted on his behalf, but appellate review, while normally comprehending these, does not require them.

Secondly, this was entirely proper. This Honorable Court has approved the use of a summary procedure, if appellant is notified of it, *Garrison v. Patterson*, 391 U.S. 464 (1968). In the present case, petitioner was notified by form letter dated January 6, 1972 that he might file a statement arguing his contentions within a period of the 20 days next following and that thereafter the Court might either (1) "Summarily dismiss the appeal . . ." or (2) "dispose of

the appeal upon briefs or oral argument." (Respondent's Appendix I) Accordingly, the Court below met the *Patterson* requirements, and certiorari shoud not issue to review this matter.

ARGUMENT II

PETITIONER'S TRIAL WAS NOT AFFECTED BY PRETRIAL PUBLICITY SO AS TO HAVE PREVENTED HIM FROM RECEIVING A FAIR TRIAL.

Petitioner next contends in view of certain "prejudicial pretrial publicity" the trial judge "did not exercise care sufficient to protect (his) constitutional right to a fair and impartial trial." He asserts (a) there was continuous publicity and he was denied a change of venue (App. p. 12); (b) reference was made in the news to the unusual circumstances of his wife's death; attempts to hold him responsible for her death and his daughter's death occurred; these could not be placed in evidence against him yet some were (App. p. 15); (c) the publicity was inflammatory and prejudicial because it sensationalized his wife's death, insinuated he was responsible for the death of his daughter, and it continually stressed and sensationalized the relationship between him and Nancy Johnson Counts (App. p. 16); (d) his trial took place in a relatively small community and was the target of a relentless barrage of publicity (App. p. 16); (e) there were repeated references to the death of his daughter which warranted a change of venue (App. p. 16). Petitioner concludes by charging his guilt was not determined solely from the evidence; the publicity about his daughter was extremely prejudicial; the jurors could not be expected to erase this; and that he has demonstrated the prejudicial nature of the publicity involved. These arguments, while long on assertions, are short on specifics. A resume of the news publicity which is a part of the record shows why this is so. (References to the Winston-Salem *Journal*, the Winston-Salem *Sentinel*, and the Sunday *Journal* and *Sentinel* are made by use of the letters "J", "S", and "J and S" respectively.)

Week 1: Aug. 17, 1965 - Aug. 23, 1965

During this week, the news articles were long to medium in length. They reported the death of Mrs. Porth and the discovery

of her body, and noted that violence and murder were suspected (S Aug. 17; J Aug. 18). On Thursday, S reported the investigation progress, quoted officers as saying "We are just looking for a place to begin"; reported that the Porth's daughter had died a few years previously; and noted that Mrs. Porth's body would be checked for toxins. On Friday, J had a personal article on Mrs. Porth who had been active in civic work in the community. A second article reported investigative steps and mentioned the toxin check. The Friday S reported the autopsy was complete, and reported on Mrs. Porth's civic involvement. The Saturday J reported there was "No new information". The Saturday S reported the memorial services for the victim, that officers were still "probing", that false leads had been run down, and repeated the autopsy. The Sunday J and S noted the investigation was continuing and reported on the memorial service. The Monday S reported that Virginia officers had returned to Winston-Salem for interviews.

The news stories above show that Mrs. Porth was a substantial member of the Winston-Salem, North Carolina, community, and that she had been found dead on a mountain road in Virginia and that her car was missing. This engendered the continuous nature of the publicity. However, as virtually no facts were known, the reporting discloses little about the crime and focused mostly on investigative efforts. Petitioner was scarcely mentioned.

Week 2: Aug. 24, 1965 - Aug. 30, 1965

During this week, the articles were of medium and short length. Tuesday's J reported the officers were still looking for the car Mrs. Porth had driven. The Wednesday J reported that an interview with a Radford, Virginia, waitress, who had reportedly seen Mrs. Porth, along with the statement that this was discounted by the police. On Wednesday, S reported, in the week's shortest article, that petitioner was "questioned", and that Mrs. Porth's car was still missing. Thursday's S reported a continuing aerial search for the car, and that the FBI was not in the case. The same article, as almost all others, routinely reported the facts of Mrs. Porth's trip, that she was found dead and apparently robbed, and the results of the preliminary autopsy. The Friday J reported that the autopsy toxin report was negative, that Mrs. Porth was not expected by the relatives she had reportedly left to visit, and that the findings of death 24 hours before discovery and Mrs. Porth's reported departure

at 9:30 the night before her body was discovered at 7 30 in the following p.m. were not consistent. The Saturday S noted an investigation lull; that leads were "slim"; that the "hitchhiker" theory was being downgraded and the investigation was concentrated in the Winston-Salem community. No news appears from Sunday or Monday newspapers.

It again appears that the reporting followed the investigation's progress. It was noted that petitioner was questioned–not an uncommon or suspicious occurrence. The focus on Winston-Salem could point no more to petitioner's guilt than any other citizen residing in that town, in the minds of the readers of the news In retrospect, only the revelation that Mrs Porth was not expected at her destination might seem suspicious

Week 3: Aug. 31, 1965 - Sept. 6, 1965

The Tuesday J contained a small article stating no new developments had occurred, and that unnamed friends of the victim had been questioned. The Tuesday S reported that investigators were looking for Nancy Johnson, a former neighbor now believed in Florida. A large article appeared in the Wednesday S, reporting Mrs. Porth's past arsenic poisoning from insecticides, her daughter's death from an illness possibly triggered either by arsenic or mononucleosis as had been previously mentioned. The article noted a possible exhumation of the body, and that the search continued for Nancy Johnson. The Thursday J again reported that officers were seeking Nancy Johnson, as did the Thursday S, which reported the "hitchhiker" theory was being abandoned by the police. Both the J and S on Friday again reported that Nancy Johnson was being sought for questioning. Nothing appeared on Saturday. The Sunday J and S included a lengthy resume of the entire case. Of relevance to petitioner's claims, that article noted only that an "angle" existed in the death of the daughter, and that petitioner had been questioned at length. On Monday, the S reported as a bulletin that petitioner's lawyers said a "break" in the case was imminent.

Once again, the press largely confined its reports to the investigative progress. Mention of petitioner's being questioned, his daughter having been poisoned, and the search for a neighbor did appear, but these were presented undramatically and without insinuation.

Week 4: September 7, 1965 - Sept. 13, 1965

On Tuesday, September 7, 1965, the J headlined that petitioner had been charged with his wife's murder. Part of the story is missing, but that which was submitted recounts only the same innocuous recap which was the mainstay of prior stories. It concluded by noting the Florida investigation was complete, an interview with petitioner had been held, and this was followed by his being charged with the offense. A separate article was sympathetic with petitioner–its headline was "Son Says Porth Innocent". A picture showed curiosity seekers around Porth's new home, which was under construction, accompanied by an article reporting that the victim's car had been found; there had been no confession; and that it had been rumored that the victim had been murdered at the new home, which caused curiosity seekers and thieves to flock around the site. On Wednesday, the house was described as unusual–a "medieval castle", and it was noted that petitioner's other home had not been the subject of mass visitations. The same article reported that the sheriff would give "no news releases except those authorized by Booker" (petitioner's lawyer). There was also a feature story on the victim's past trip, years before, to the South Seas, about which she had given an interview to the local papers approximately 3 years before. It was accompanied by a photo of her own handwritten definition of the word "Aloha". Another article reported the finding of the car. The S headlined that petitioner would plead not guilty; stated that Nancy Johnson was not implicated in the case, and that "Sheriff Stone has been mum about the case since the arrest and has apparently agreed to give out no information until it is cleared with the defense". A separate article reported that petitioner had pleaded not guilty at the preliminary hearing, which it described as "quick and quiet", and contained a factual background report. A rumor that a private prosecutor would be hired was said to be untrue. The defense attorney, Booker, was reported as stating that the case was "discussed" so widely that a fair trial was impossible. A picture of the long-sought automobile being inspected was also shown. The Wednesday J reported hundreds of curiosity seekers viewing the new home of petitioner and the victim, that the regular home was undisturbed by these people, and that items at the construction site of the new home were being safeguarded from thieves. The article also described Porth's reputation as "friendly" and civic minded. A picture of the victim's car also appeared. An article entitled

"Brother of Victim Shocked at Charge" also appeared, in which the victim's brother stated he "Just can't believe his sister was killed by her husband." He was further quoted as saying "It must have been an accident", and that if petitioner were convicted "he will do anything he can to save Porth's life." Another article appeared describing why detection of the missing car took so long. Another article–a "human interest story"–described petitioner's interest in plants, his new house, and further described him as a "man of many abilities", concluding by reporting his spirits were better due to visits by friends. A longer article, accompanied by a picture of petitioner, stated he would plead not guilty, that the sheriff made no comment and would not unless it was cleared with petitioner's attorney It recounted the investigation, but added "It is understood that Mrs. Johnson provided information that is an important part of the police case against Porth". Petitioner's attorney was quoted as charging "prosecution" by the press, that petitioner "cannot get a fair trial here", and that the press had not pictured petitioner as deserving "sympathy and respect". The Wednesday S reported that petitioner himself had asked for the conference which resulted in his arrest, that the information was volunteered and resulted in finding the missing car. It repeated his relative's disbelief of petitioner's criminality. Thursday's J reported that the brother of the victim would not hire a private prosecutor, and that Nancy Johnson would be a state's witness. Her evidence was not revealed. It also noted the sheriff would say nothing, and that Booker had "quit talking", and that therefore there was no new information except that petitioner had sought the conference which led to his arrest. A picture of the arraignment was included. The Thursday S showed a photograph of the warrant, headlined the "innocent plea", reported on the arraignment, dress, and the procedures at the preliminary hearing. It reported the officers refused to state what was said at the conference which led to petitioner's arrest The contents of the warrant were set out, and the press noted that no weapon was specified, stated the police did not know what weapon was used, and that there were "rumors" of death by strangulation. The Friday J noted that petitioner's trial might occur in the near future. The Friday S headlined "Porth Death 'Accident' Mrs. Johnson Believes". The article gave her local background, contained her assertion that she was not implicated, and quoted her as saying petitioner had told her it was an accident and she believed him. The Saturday J repeated the above, noted petitioner's statement had not been described as a confession, and repeated petitioner's

brother-in-law's statement that it "must have been an accident". Saturday's S explained the mechanics of seeking an indictment, and noted the solicitor was not ready to try the case. The Monday S reported the grand jury had indicted petitioner.

From the above, it appears that in the fourth week, petitioner was first tied to the crime by his own voluntary conference which led to his arrest. The reporting then followed the technical steps from arrest to indictment, and reported other developments. No evidence against petitioner was given out by the press, and it alluded to unspecified evidence only once (that of Nancy Johnson). The sheriff refused to make statements to the press, articles sympathetic to petitioner abounded–from his son, his brother-in-law, his ex-neighbor. The "accidental death" defense was floated out for public consumption. Petitioner was presented as "a man of many abilities", a victim of hate callers, curiosity seekers and thieves. It was made known that petitioner's statement was not a confession, and that he would and did plead not guilty. A rumor about private prosecution was laid to rest, a rumor of death by suffocation was circulated. His lawyer obtained publication of completely unwarranted charges of "prosecution" by the press, and charged the lack of sympathy for his client, completely ignoring the quantity of news which was of the *genre*. Petitioner's attorney also asserted that discussion of the "case" prevented a fair trial although the press gave none of the "case" beyond the fact of death and arrest to its readers.

Week 5: Sept. 14, 1965 - Sept. 20, 1965

In this week, only three short articles appeared. One reported the indictment on Monday; the next two reported a continuance of the case. In the Wednesday J, a letter to the editor attacked the community's ("our") response to the events as unchristian and chided it to remember the presumption of innocence.

Week 6: September 21, 1965 - Sept. 27, 1965

The Tuesday J reported in a brief article that petitioner had had a medical examination for dizziness. The Wednesday S and Thursday J reported that the solicitor would oppose a change of venue, and the Thursday S quoted him as doubting a motion would be made. Friday's J quoted the solicitor as saying petitioner could get a fair trial in Winston-Salem.

Week 7: Sept. 28, 1965 - Oct. 4, 1965

No news appears in this week except an article saying the solicitor would need another continuance.

Week 8: Oct. 5, 1965 - Oct. 11, 1965

During this week, a Tuesday J article of short length reported the case would be tried in November at the earliest. On the Monday following, the S reported that petitioner would move for a change of venue or a special venire.

Week 9: Oct. 12, 1965 - Oct. 18, 1965

On Tuesday, the J reported that the motion for a change of venue would be made.

Week 10: Oct. 19, 1965 - Oct. 25, 1965

On Tuesday, the J, in a long article, reported that the solicitor would seek an exhumation of the bodies of Mrs. Porth and the Porth's deceased daughter. The solicitor had not announced this, but the story broke in Milwaukee, Wisconsin, where the district attorney of that city made the necessary motion on behalf of the State of North Carolina. The legal problems involved were set out in the article. The solicitor's request, evidently made by letter, was quoted as having stated that a later conference with the physician who made the autopsy resulted in that physician noticing other marks on the body. It quoted petitioner's defense as being accidental fall, but stated that the examiner believed that the victim had been severely beaten. It noted that the state's information "was incomplete". This article is not complete as it appears in the record. On October 20, the solicitor was reported as surprised at the publication of his letter, and the exhumation request was reported as acceptable to petitioner's brother-in-law. Neither article is complete as it appears in the record. Both the S and the J reported on October 23 and 24 that the State of Virginia was joining the request for exhumation.

The foregoing articles again thrust petitioner's case into the public eye. However, once again, no evidence against petitioner was reported by the press. The publicity was engendered by the

Week 7: Sept. 28, 1965 - Oct. 4, 1965

No news appears in this week except an article saying the solicitor would need another continuance.

Week 8: Oct. 5, 1965 - Oct. 11, 1965

During this week, a Tuesday J article of short length reported the case would be tried in November at the earliest. On the Monday following, the S reported that petitioner would move for a change of venue or a special venire.

Week 9: Oct. 12, 1965 - Oct. 18, 1965

On Tuesday, the J reported that the motion for a change of venue would be made.

Week 10: Oct. 19, 1965 - Oct. 25, 1965

On Tuesday, the J, in a long article, reported that the solicitor would seek an exhumation of the bodies of Mrs. Porth and the Porth's deceased daughter. The solicitor had not announced this, but the story broke in Milwaukee, Wisconsin, where the district attorney of that city made the necessary motion on behalf of the State of North Carolina. The legal problems involved were set out in the article. The solicitor's request, evidently made by letter, was quoted as having stated that a later conference with the physician who made the autopsy resulted in that physician noticing other marks on the body. It quoted petitioner's defense as being accidental fall, but stated that the examiner believed that the victim had been severely beaten. It noted that the state's information "was incomplete". This article is not complete as it appears in the record. On October 20, the solicitor was reported as surprised at the publication of his letter, and the exhumation request was reported as acceptable to petitioner's brother-in-law. Neither article is complete as it appears in the record. Both the S and the J reported on October 23 and 24 that the State of Virginia was joining the request for exhumation.

The foregoing articles again thrust petitioner's case into the public eye. However, once again, no evidence against petitioner was reported by the press. The publicity was engendered by the

"incomplete" nature of the case against petitioner, rather than the strength of the state's case. The information with regard to his daughter's death was sought in order to determine whether or not she had been poisoned intentionally or by mistake. None of these charged petitioner with any new act, nor did they indicate any belief that petitioner had killed his daughter or, that he had done so intentionally.

Week 11: Oct. 26, 1965 - Oct. 31, 1965

The Tuesday J reported the legal skirmishes surrounding the request for exhumation and reported the state desired to determine whether petitioner's daughter was poisoned intentionally or by a mistake. The Saturday S noted that petitioner intended to move for a bill of particulars.

Week 12: Nov. 1, 1965 - Nov. 7, 1965

The Tuesday S and Wednesday J each reported two stories concerning the motion for a bill of particulars. Of relevance to petitioner's claim, the solicitor made known in court that the exhumation had been caused by a "voluntary unsolicited statement that (petitioner) would straighten the arsenic cases out later", and admitted that any evidence arising from the exhumation would be limited.

Week 13: Nov. 8, 1965 - Nov. 14, 1965

No news from this week is contained in the record.

Week 14: Nov. 15, 1965 - Nov. 21, 1965

The Thursday S reported a resumption of the hearing on the bill of particulars was scheduled for the following day. The Saturday S reported that the motion had been denied.

Week 15: Nov. 22, 1965 - Nov. 29, 1965

No news from this week is contained in the record.

Week 16: Nov. 30, 1965 - Dec. 6, 1965

No news from this week is contained in the record.

Week 17: Dec. 7, 1965 - Dec. 13, 1965

No news from this week is contained in the record.

Week 18: Dec. 14, 1965 - Dec. 20, 1965

The Friday S reported the filing of Mrs. Porth's will. The Monday S reported that the exhumation hearing would be held in Milwaukee the following day.

Week 19: Dec. 21, 1965 - Dec. 27, 1965

The Tuesday J reported the exhumation hearing was to be held that day in Milwaukee, and the S reported that the hearing had been postponed. The Thursday S reported that the motion for the bill of particulars had been denied. On Friday, both the J and S reported the filing of Mrs. Porth's will.

Week 20: Dec. 28, 1965 - Jan. 3, 1966

No news from this week is contained in the record.

Week 21: Jan. 4, 1966 - Jan. 10, 1966

The Wednesday J reported Booker as saying the judge who denied his motion for a bill of particulars violated petitioner's rights by the order. An undated article reported a conference of Virginia medical officers in preparation for the exhumation hearing. On Monday, the S reported that witness Nancy Johnson was filing for divorce against her husband.

Week 22: Jan. 11, 1966 - Jan. 17, 1966

On Monday, the S reported that each side was traveling to Milwaukee for the exhumation hearing.

Week 23: Jan. 18, 1966 - Jan. 24, 1966

On Tuesday, the J reported that the hearing was set for that day. Another article appeared with Mrs. Porth's name in the head; however, only that part of the article is contained in the record. Neither article reported that Kathy Porth's exhumation was to

determine whether or not she was poisoned. On Thursday, the J carried a picture of workmen exhuming the bodies, and a medium length article reporting mainly the mechanics of the hearing. The article noted the autopsy on Mrs. Porth had been incomplete, and that Kathy Porth's body was wanted in order to determine if she was poisoned. The Friday S and the Saturday J reported that suffocation was not the cause of death as had been previously rumored by an article reported in the September 9 J. The article also reported Mrs. Porth's estate at about $15,000. A separate article gave a fuller account of her estate. The Monday S, in a short article, reported the birth of a child to Nancy Johnson, who had been long separated from her husband.

Week 24: Jan. 25, 1966 - Jan. 31, 1966

The Tuesday J reported the birth of a child to Nancy Johnson in a short article. The Tuesday S reported that the poison tests on the body would be made in Virginia. There also appears undated the bottom part of a letter to the editor charging the paper with insinuating the baby was tied to the case.

Week 25: Feb. 1, 1966 - Feb. 7, 1966

No news appears in the record for this week.

Week 26: Feb. 8, 1966 - Feb. 15, 1966

No news appears in the record for this week.

From the foregoing review of the articles which are a part of the record, the following can be said of petitioner's contentions. (a) It is true that publicity continued throughout the period from crime to trial, although it was not incessant in nature; and it is true that petitioner was denied a change in venue; however, the reporting during this period tended to follow the mechanical aspects of the case, was factual in nature, and after the fifth week, and long before the trial months later, reporting became intermittent. (b) Reference was made to the unusual circumstances of the death of the victim; however, no attempt was made by the press to hold petitioner responsible for the death; nor did the press ever give any intimation concerning Kathy Porth's death, but described it only as the police angle, and always reported that whether or not she

was poisoned was the matter to be discovered, and if so, whether it was accidental or on purpose. With regard to this matter at trial, Nancy Johnson, as a part of the state's case, placed the time of the liaison between her and petitioner after Kathy Porth's death (Tr p 533), and testified that petitioner and his daughter were close (Tr p 618). (c) The publicity was not inflammatory and did not "sensationalize" his wife's death. Reporting was almost always factual, and never beyond the quantum dictated by the investigative events and Mrs. Porth's stature in the community. Those parts which were subjective in nature tended to be sympathetic to petitioner, e.g., his relatives and friends' supporting comments, letters to the editor on his behalf, assertions (unfounded) of unfairness by his lawyer, personal affronts to him from hate mail, curiosity seekers and thieves. Three rumors on the case were reported, but two were later ruled out. The third concerned the location of the place where the death occurred which was hardly an inflammatory matter. No state's evidence concerning anything other than the fact of death was ever presented by the papers except for the fact that a statement had been given by petitioner, and that he had volunteered a statement on arsenic. The last of these occurred three months before trial. Moreover, the press spread the idea of the defense of "accident" which had been proffered by petitioner's friends and relatives. The press never insinuated petitioner was responsible for the death of his daughter, and no relationship between him and Nancy Johnson was ever intimated by the press, which described her only as a former neighbor and a state's witness. Other than short and limited reporting on the birth of her child, she had scarcely been mentioned in the press since November. Moreover, with regard to the birth of her youngest child, Nancy Johnson at trial indicated that she did not know who the father of the child was (Tr p 582, 621). (d) Petitioner's trial took place in Winston-Salem, North Carolina, then the State's second largest city having a population of well over 100,000 persons within the city itself, not including the county from which jurors were also drawn. There was no publicity in the nature of a "barrage" nor was publicity "relentless". (e) There were repeated references to the death of petitioner's daughter; however, none ever ascribed the death of his daughter to petitioner, nor were any of the articles of unusual length or primary focus. Like other aspects of petitioner's case, this matter was reported only when timely.

Applying the law to the set of facts outlined above, it is

apparent petitioner's trial was not affected by the above publicity. As noted before, it was appropriate in amount, factual in nature, and often sympathetic to petitioner. It was intermittent during the nearly four months between arrest and trial. The rule is that where prejudicial publicity exists, it does not disqualify jurors who have heard it if they can lay it aside in reaching a verdict, *U.S. v. Milanovich*, 303 F. 2d 626 (4th Cir. 1962). Here, the publicity was not even prejudicial. In order for petitioner to obtain relief he must show that the accounts must have so prejudiced him in the eyes of the community that a fair trial was necessarily prevented, *Stroble v. California*, 343 U.S. 181 (1952). In this case, however, the accounts, by their facts and comments, were not damaging to petitioner. In the balance on this matter are also the facts that on the hearing for a change of venue, the state produced 25 affidavits and four witnesses that a fair trial could be had in Forsyth County; no continuance was sought by petitioner; peremptory challenges were not exhausted by him; each juror had no opinion on the guilt or innocence of the petitioner; and the jurors were sequestered daily throughout the trial. Because of the foregoing, certiorari should not be issued to review this matter.

ARGUMENT III

EVIDENCE AGAINST PETITIONER WAS NOT PROCURED BY DURESS, AND PETITIONER'S SHOWING IN THIS REGARD IS INSUFFICIENT TO MERIT HIM RELIEF IN A FEDERAL HABEAS CORPUS PROCEEDING.

Petitioner's next contention is that he was denied a fair trial because the state's primary witness testified out of fear of being arrested, has repudiated her testimony, and under state law, he is therefore entitled to a new trial. These allegations merit him no relief.

The last of these arguments is not properly before the Court. Habeas corpus exists for the vindication of federal and not state rights, *Johnson v. Zerbst*, 304 U.S. 458 (1937), *Fay v. Noia*, 372 U.S. 391 (1963). Any right to a new trial petitioner may have under state law must be vindicated by the state, and not the federal courts. Parenthetically, respondent, in its review of petitioner's massive file, has not discovered a motion for a new trial on the basis of the evidence proffered.

The second of these arguments is likewise not properly before the Court. Repudiation of testimony goes to the merits of guilt or innocence, not the constitutionality of state action in conducting an investigation or trial. Habeas corpus exists only to challenge custody obtained in violation of the Constitution or laws of the United States, 28 U.S.C. 2254, not custody incorrectly obtained bacause a jury did not accurately gauge the credibility of a witness, *U.S. v. Shipp*, 409 F. 2d 33 (4th Cir. 1969).

With regard to the first of petitioner's allegations, an affidavit (Appendix II, to this response) signed by Nancy Johnson Counts and dated August 21, 1966, was made a part of the post-conviction proceedings in state court. Mrs. Counts did not appear personally, having moved to Australia (PCH Tp 40,41). A Nancy Johnson was a primary witness for the state (Tr Tp 494-637), and her testimony supplied two incriminating statements (Tr Tp 547, 548), and a motive against petitioner. However, motive was also supplied by statements petitioner made to the sheriff. (Tr Tp 460, 467). After the time of the trial on February 19, 1966, Nancy Johnson evidently married defense witness John Counts, with whom she had lived in Florida, and who testified at trial that he desired to marry her (Tr Tp 1075).

The affidavit recites (a) that Mrs. Counts has "facts that proved Mr. Counts has lied at trial"; (b) that when she testified she was either under hypnosis or shock but a "bad blow" had brought her out of it and she now remembered "things" which happened prior to the birth of her child, and remembered viewing the pictures of Mrs. Porth's body; (c) that she was in fear of being placed under arrest when she testified; and (d) she knew no facts which indicated that petitioner is guilty of first degree murder.

As a whole, her affidavit is scarcely literate, and is so confused, conclusory and incredible as to necessitate no further proceedings because of it. As for her allegation concerning Counts' lying, his testimony corroborated her's at trial, and was described as harmless by defense counsel (PCH Tp 86, 87). With regard to any hypnosis or shock under which influence she may have been, it was obviously unapparent not only to the jury, but to defense counsel, as he made no inquiry into the matter. Additionally, a review of Mrs. Johnson's testimony at trial showed that other than the remembrance of certain particular dates, her testimony was lucid. The "things" now supposedly remembered are unspecified in the affidavit, and it is

hard to imagine' what more beyond her testimony she might bring forth now. The reference to remembering having viewed the pictures of Mrs. Porth's body is strange, as she testified to having viewed them at trial (Tr Tp 592, 594). Mrs. Johnson's fear of arrest is not specified. She, herself, brought out at trial that it was a possibility (Tr Tp 587), and the jury had this before it for its aid in gauging her testimony. However, at trial she also testified that her testimony was the truth despite this factor, and further acknowledged that she had been informed that she was not required to make any statement to the police (Tr Tp 620). At petitioner's post-conviction hearing, contrary hearsay was introduced (PCH Tp 107). However, the state also produced evidence that no charges involving murder were held over her (PCH Tp 155), and threats by the investigating officers were denied (PCH Tp 153). It appears some warrants against her may have been held by officers from another city; however, these involved only motel registration under a false name (PCH Tp 143), a petty offense and one which could not conceivably deter a witness from testifying favorably to her paramour where his life was at stake. Finally, Mrs. Counts' lack of knowledge of "any facts (indicating petitioner) is guilty of first degree murder" is likewise further unexplained in the affidavit. This was denominated as conclusory at the state post-conviction hearing (PCH Tp 126), and it was properly noted by the District Court that this fails to amount to a repudiation (Order p 6, Application for Certiorari, PA 6). Taking the affidavit as a whole, including those parts most relevant to petitioner's allegation that her testimony was obtained under duress, it is apparent that the affidavit is insufficient to merit further inquiry into the matter and that certiorari should not issue to review it.

ARGUMENT IV

PETITIONER WAS NOT DENIED DUE PROCESS OF LAW BY THE TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER.

Petitioner next contends his rights were violated by the admission of testimony concerning the death of his daughter. The North Carolina Supreme Court dealt with this in the following manner on petitioner's appeal

"One of the assignments of error involved a question addressed to William Porth, son of, and witness for, the defendant. He had testified that he came home from Alaska for his sister's funeral in 1972. The solicitor's question was 'Don't you know for a fact that your sister died from arsenic poisoning?' Answer. 'No, sir, I don't.' He was asked whether the family did not discuss arsenic poisoning. He said arsenic was never mentioned. The question and the answer were admitted over the defendant's objection. As bearing on the objection it should be remembered that the defendant first brought up the 'arsenic deal' as one of the skeletons in his closet. This was one of the reasons he assigned for his panic and his realization no one would believe that is wife had been killed by the fall down the steps. Nancy Johnson had quoted the defendant as saying Mrs. Porth was in the hospital because of arsenic poisoning. These clues alone were sufficient to justify the solicitor's efforts to find out if an attempt had been made to take Mrs. Porth's life by poisoning. Such efforts, if attributable to the defendant, would have obvious bearing on the question of premedtation, *State v. Faust*, 254 N.C. 101, 118 S.E. 2d 769; *certiorari* denied, 368 U.S. 851. However, the solicitor's effort to show by cross-examination of William Porth that his sister died as a result of arsenic poisoning was not warranted. The court should have sustained the objection. There was nothing to show the daughter, at the time of her death, was a member of the defendant's household, or that by mistake she took arsenic poisoning which the defendant had intended for Mrs. Porth.

"Absent a showing that the death of witness Porth's sister was caused by arsenic poisoning which was intended, not for her, but for her mother, the inquiry into the cause of the sister's death would appear to be improper as introducing evidence of a separate and independent crime. The rule, and the exceptions with respect to such evidence are fully discussed in *State v. McClain*, 240 N.C. 171, 81 S.E. 2d 364 The question may be debatable whether the evidence of

> the sister's death by poisoning is governed by the general rule and should be excluded, or by the exceptions, and should be admitted. But assuming the question was improper, nevertheless, the answer was exculpatory and rendered the inquiry harmless." 269 N.C. at 338, 339; 153 S.E. 2d at 17, 18 (1966)

From the above, it is obvious that this evidentiary matter violated neither a specific constitutional provision nor any concept of fundamental fairness as is required for habeas corpus relief in the context of petitioner's assertion, *Grundler v. North Carolina*, 283 F. 2d 798 (4th Cir. 1960), and that the same result would have occurred in an appeal of the matter within the federal court system, *Sidders v. U.S.*, 381 F. 2d 513 (9th Cir. 1967). Accordingly, certiorari should not issue to review this matter.

ARGUMENT V

PETITIONER WAS NOT REQUIRED TO UNCONSTITUTIONALLY ASSUME THE BURDEN OF PROOF.

Petitioner further contends that autopsy evidence was improperly admitted because the state failed to show the handling of the body during the 5-month interim between death and autopsy. Therefore the possibility of mishandling during shipment and interment was not negated and the jury could not fairly judge the testimony concerning the autopsy, unless petitioner showed that mishandling was the case. He argues this amounts to an unconstitutional shift in the burden of proof.

This contention is frivolous. The burden of proof which may not be shifted is that concerning the ultimate issue of guilt or innocence. This, however, does not require the state to nail down every conceivable loose end as prerequisite to having the jury pass upon its case; nor does it prohibit the state from presenting a case which will convict only if unrefuted, *Virgin Islands v. Lake*, 362 F. 2d 770 (3rd Cir. 1966), *Virgin Islands v. Torres*, 161 F. Supp. 699 (DC VI 1958). Accordingly, certiorari should not issue to review this matter.

ARGUMENT VI

PETITIONER'S APPLICATION FOR WRIT OF HABEAS CORPUS WAS PROPERLY REVIEWED.

Petitioner lastly contends he is entitled to a hearing *de novo* under *Townsend v. Sain*, 377 U.S. 293 (1963) despite his state court hearing. He gives two reasons: (a) the state court "failed to take into full account the full impact of the pretrial publicity"; and (b) a substantial allegation of newly discovered evidence. Neither merits him a hearing. The federal courts below fully reviewed both matters on the record submitted to them, and independently applied federal standards to the evidence and factual findings relating to them. Nothing more was required, *Fay v. Noia*, 322 U.S. 391 (1963), and certiorari should not issue to review this matter.

CONCLUSION

From the foregoing arguments and authorities, it conclusively appears that petitioner has brought no matter to this Court's attention which would justify its further consideration of his case. He has wholly failed to show either legal wrong amounting to an infringement of his constitutional rights, or any damage to him arising out of same. Accordingly, his application for writ of habeas corpus was properly denied by the District Court; his appeal was properly dismissed by the Court of Appeals; and certiorari should not issue from this Honorable Court to further review petitioner's case.

This day of September, 1973.

Respectfully submitted,

ROBERT MORGAN
Attorney General
of North Carolina

RICHARD N. LEAGUE
Assistant Attorney General

Counsel for Respondent

Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 829-7188

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Brief on Petitioner by placing three copies in the United States Mail at Raleigh, North Carolina, postage prepaid, addressed to Petitioner at 835 West Morgan Street, Raleigh, North Carolina 27603, on the day of October, 1973.

Richard N. League
Assistant Attorney General

APPENDIX I

UNITED STATES COURT OF APPEALS
Fourth Circuit

January 6, 1972

Samuel W. Phillips
Clerk

Telephone 643-5592
Area Code 703
Tenth and Main Streets
Richmond, Virginia 23219

RE: No. 72-1012, Robert E. Porth, v. Warden of the State Penitentiary of the State of North Carolina (C-300-G-70)

TO: Robert E. Porth
835 West Morgan Street
Raleigh, N.C. 27603

Hon. Jacob L. Safron
Assistant Attorney General
N. C. Dept. of Justice
P. O. Box 629
Raleigh, N.C. 27602

Info copy

Fred G. Crumpler, Jr., Esq.
Winston-Salem, N.C. 27101

The record on appeal has been received in this office.

You are each granted 20 days from the date of this memorandum to state why the judgment of the district court should be reversed or upheld. Your statements need not be in technical legal form. A simple explanation of the merits of the appeal will be sufficient.

Even if you do not file such a statement, the Court will carefully consider the merits of the appeal and will not rule against you merely because no statement was filed.

After the expiration of 20 days, the record and any statements filed will be submitted to a panel of the Court who, upon consideration of the merits of the appeal, may take the following action:

(1) Summarily dismiss the appeal, affirm, or reverse the judgment of the district court without appointment of counsel, full briefing and oral argument, or

(2) Appoint counsel (if a party is indigent and without counsel), direct that briefs be submitted and dispose of the appeal upon the briefs or oral argument.

For the convenience of parties not represented by counsel, there is enclosed a form which may be used in submitting the statement.

CLERK

APPENDIX II

State of Florida, County of Broward **Affidavit**

I, Nancy Johnson Counts, after first being duly sworn, depose and say; that I make the foregoing statement voluntarily and of my own free will without threat or fear or promise of remuneration and have voluntarily called Mr. Fred G. Crumpler, Attorney, of Winston-Salem, N. Carolina, and have requested the opportunity to make the foregoing statement.

I have facts that prove that Mr. Counts has lied, at the trial.

At the time I testified, I was either under hypnosis or in a state of shock, and the bad blow I received in Broward County 2 July 1966 brought me out of it. I remember clearly now the things that happened prior to the birth of my child and viewing the pictures of Mrs. Porth's body that I did before the blow.

At the time I testified, I was in fear of being placed under arrest.

Q. Mrs. Counts, at the present time, if you testify as to all facts within your knowledge concerning the death of Mrs. Porth, are there any facts whatever that indicate that Mr. Porth is guilty of first degree murder?

A. No.

Q. Will you volunteer to appear and testify to the facts you know if there is a trial?

A. Yes.

I have read the foregoing statements and they are true to my own knowledge, August 21, 1966.

Sworn to and subscribed before me this twenty-first day of August, nineteen sixty six.

/s/ Nancy Johnson Counts
Nancy Johnson Counts

/s/ (Name of notary illegible)
Notary Public
My commission expires
10-31-67

SEAL

FILE COPY

Supreme Court, U. S.
FILED
SEP 25 1973
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES
FALL TERM, 1973

NO. 72-1580

ROBERT E. PORTH,
Petition,

vs.

WARDEN OF THE STATE PENITENTIARY
OF NORTH CAROLINA,
Respondent,

REPLY BRIEF

ROBERT E. PORTH
Petitioner prose
In propria personam
Central Prison
835 West Morgan Street
Raleigh, N.C. 27603

September 24, 1973

SUPREME COURT OF THE UNITED STATES

FALL TERM, 1973

NO. 72-1580

ROBERT E. PORTH,

Petitioner,

vs.

WARDEN OF THE STATE PENITENTIARY OF NORTH CAROLINA,

Respondent.

REPLY BRIEF

NOW COMES, Robert E. Porth, the petitioner in this cause of action, filing this REPLY BRIEF in support of the grantment of certiorari in this cause by the Court, and the grantment of the relief sought, and in support of such petition would show unto the Court:

OPINION BELOW

The petitioner adopts by reference thereto the entries already made by Petitioner and Counsel for Respondent as to this matter.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1) and Rule 19 of the Rules of the Supreme Court of the United States, rather than 28 U.S.C.A., 1257(3), as erroneously stated by counsel for respondent in the Brief Respondent.

QUESTIONS PRESENTED

Petitioner reinstates the Questions Presented For Review as set out in his Petition for Writ of Certiorari, as he is not satisfied with the rewording of same by respondent:

I. DOES THE ISSUANCE OF A CERTIFICATE OF PROBABLE CAUSE BY THE DISTRICT COURT, ENTITLE A PETITION ON APPEAL TO A UNITED STATES COURT OF APPEALS, TO MORE THAN A SUMMARY DISMISSAL OF HIS APPEAL, BASED UPON THE REASONS STATED BY THE DISTRICT COURT IN ITS DENIAL OF HABEAS RELIEF?

II. WAS ROBERT E. PORTH DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE TRIAL JUDGE DID NOT EXERCISE CARE SUFFICIENT TO PROTECT PORTH'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL, IN PARTICULAR, THE FEDERAL COURTS HAVE REPEATEDLY HELD THAT THE TRIAL JUDGE IS UNDER AN AFFIRMATIVE DUTY TO SHIELD THE ACCUSED FROM THE PREJUDICIAL EFFECTS OF MASSIVE, ADVERSE PUBLICITY?

III. WAS ROBERT E. PORTH DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE STATE'S PRIMARY WITNESS TESTIFIED WHILE IN FEAR OF BEING ARRESTED, AND HAS SUBSEQUENTLY REPUDIATED HER TESTIMONY?

IV. WAS ROBERT E. PORTH DENIED A FAIR AND IMPARTIAL TRIAL BY REASON OF THE FACT THAT TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER WAS ERRONEOUSLY ADMITTED INTO EVIDENCE?

V. WAS ROBERT E. PORTH DENIED A FAIR AND IMPARTIAL TRIAL BY REASON OF THE FACT THAT THE TRIAL COURT PERMITTED TESTIMONY CONCERNING AN AUTOPSY WHICH WAS PERFORMED ON MRS. PORTH FIVE MONTHS AFTER HER DEATH WITHOUT A SHOWING AS TO TREATMENT OF THE BODY IN THE INTERIM?

VI. WAS ROBERT E. PORTH ENTITLED TO A HEARING ON HIS PETITION FOR HABEAS CORPUS?

CONSTITUTIONAL PROVISIONS INVOLVED

That this cause concerns the application of Section 1 of the Fourteenth Amendment to the U.S. Constitution, as set out by the petitioner in his petition for writ of certiorari, filed in this cause.

STATEMENT OF THE CASE

The petitioner reiterates herein as if fully set out by reference thereto the STATEMENT OF THE CASE, as set out by him in the Petition for Writ of Certiorari filed in this cause and states that the petitioner seeks in this Court a reversal of the Memorandum Decision of the U.S. Court of Appeals of January 24, 1973, and the Order denying petition for rehearing entered in this cause on March 5, 1973, by the United States Court of Appeals for the Fourth Circuit, rather than the Order of the United States District Court for the Middle District of N.C. of October 26, 1971, as stated by counsel for respondent.

REASONS FOR THE GRANTMENT OF WRIT OF CERTIORARI BY THIS COURT

The petitioner in this Reply Brief, will briefly point out the merits of his various contentions.

ARGUMENT NO. I

THE ISSUANCE OF THE CERTIFICATE OF PROBABLE CAUSE BY THE DISTRICT COURT BELOW, ENTITLED THE PETITIONER ON APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, TO MORE THAN THE SUMMARY DENIAL AND SUMMARY DISMISSAL GIVEN TO HIM BY THAT COURT BASED UPON THE REASONS STATED BY THE DISTRICT COURT IN ITS DENIAL OF HABEAS RELIEF.

It is clear that a Certificate of Probable Cause to appeal was issued and granted by the District Court below on December 29, 1971, See A-9, Attached to Petition for Writ of Certiorari filed in this Court.

It is clear that the U.S. Court of Appeals did not properly consider the appeal, in that its MEMORANDUM DECISION of January 24, 1973 states:

> "Accordingly, although leave to proceed in forma pauperis is granted, a certificate of probable cause to appeal is denied."

It is clear that this appeal was not an informa pauperis appeal, as the petitioner has paid his way through all the courts that he has entered in his search for justice. And it is clear that a certificate of probable cause to appeal has already been granted, and that the petitioner was entitled to more than the summary dismissal.

It is clear that the petitioner was not given a proper review on appeal in this matter in the United States Court of Appeals for the Fourth Circuit.

It is clear that this summary denial and dismissal of the appeal was not a determination on the merits, as the petitioner was entitled to an appeal of right after the issuance of the Certificate of probable cause to appeal.

ARGUMENT NO. II

ROBERT E. PORTH WAS DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE TRIAL JUDGE DID NOT EXERCISE CARE SUFFICIENT TO PROTECT PORTH'S CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL TRIAL, IN PARTICULAR, THE FEDERAL COURTS HAVE REPEATEDLY HELD THAT THE TRIAL JUDGE IS UNDER AN AFFIRMATIVE DUTY TO SHIELD THE ACCUSED FROM THE PREJUDICIAL EFFECTS OF MASSIVE, ADVERSE PUBLICITY.

Excessive publicity, (over 100 articles) either good or bad leads to excessive speculation and makes any such case the subject of major interest and discussion. Too many preconceived ideas must carry over into the jury room.

It is clear that Counsel for Respondent, stopped his reporting of the news coverage, just prior to the trial and during the trial.

It is clear that the petitioner sought a change of venue, but was denied, that this denial of the change of venue, after the massive, adverse publicity generated in this case, the denial of this motion for change of venue, was in itself a denial to this petitioner of his constitutional right to a fair and impartial trial.

The test of time reveals that Mr. Porth was tried, not in an atmosphere of probable unfairness, but rather actual unfairness. The trial judge should have recognized the *probable* unfairness which Mr. Porth faced. A change of venue or a special venire would have protected Mr. Porth from this inherent unfairness.

ARGUMENT NO. III

ROBERT E. PORTH WAS DENIED A FAIR TRIAL BY REASON OF THE FACT THAT THE STATE'S

PRIMARY WITNESS TESTIFIED WHILE IN FEAR OF BEING ARRESTED, AND HAS SUBSEQUENTLY REPUDIATED HER TESTIMONY.

Most of Nancy's testimony was lies, largely due to the fact of coercion and threats of the prosecution. The fact that she skipped the country to get away from the jurisdiction of the Court at the time of the post conviction hearing is indicative of her guilt of perjury and testifying to false evidence at the trial had in this matter, at the February 1966, Term of Forsyth County Court.

It is submitted, that the petitioner was entitled to a fair trial by the State, and the pressure used against this witness to compel testimony against the petitioner, is a clear indication that the petitioner was not given his constitutional right of a fair trial in this cause.

It is submitted, that a conviction obtained by the use of perjury and false evidence must fall of its own weight.

It is clear that Nancy's conscience was bothering her about the perjury and false evidence that she gave in the trial of this matter in February, 1966, in that the Affidavit was sworn to and subscribed by her while the case was on appeal to the Supreme Court of North Carolina on August 21, 1966.

It is not how or who is to blame for the denial of the fair trial in this matter, it is simply that the petitioner is entitled to relief for its denial to him.

ARGUMENT NO. IV

ROBERT E. PORTH WAS DENIED A FAIR TRIAL AND IMPARTIAL TRIAL BY REASON OF THE FACT THAT TESTIMONY CONCERNING THE DEATH OF HIS DAUGHTER WAS ERRONEOUSLY ADMITTED INTO EVIDENCE.

That the admission of this evidence, was made more

prejudicial by the pre-trial publicity in the news media concerning this matter.

That it is clear that the trial judge did not instruct the jury to disregard this improper and incompetent evidence, which was brought out by the Solicitor in questioning of the Petitioner's son.

As pointed out in the action, the first opinion of the North Carolina Supreme Court in regards to this question was recalled and another was issued.

That this is just another of the instances which are clearly pointed out and shown that the petitioner was denied his constitutional right to a fair and impartial trial at the February 1966 Term of Forsyth County Superior Court.

Petitioner has never been afforded the opportunity for a constitutionally fair trial, free from the prejudice of such incompetent evidence. This constitutional guaranty should be extended to him immediately by awarding him a new trial.

It is submitted that the modification of the opinion of the Supreme Court of North Carolina had a substantial effect on the fate of petitioner, and that the prejudicial questions complained of herein are not constitutionally acceptable.

ARGUMENT NO. V

ROBERT E. PORTH WAS DENIED A FAIR AND IMPARTIAL TRIAL BY REASONS OF THE FACT THAT THE TRIAL COURT PERMITTED TESTIMONY CONCERNING AN AUTOPSY WHICH WAS PERFORMED ON MRS. PORTH FIVE MONTHS AFTER HER DEATH WITHOUT A SHOWING AS TO TREATMENT OF THE BODY IN THE INTERIM.

The ensuing second autopsy in this matter, reveals

that bruises thought at the time of the first autopsy to be meaningless, were found to have caused the death. It is submitted to the Court that a great portion of the said bruises were the results of a previous bout with poison ivy by Mrs. Porth.

That x-rays of the second autopsy revealed additional bone damages, proving rough handling of the body in the interim.

On second autopsy, pathologist failed to determine a single cause of death, so concluded that death was due to multiple bruises. These same bruises were considered superficial by Dr. Jenaro S. Asteinza, who performed the first autopsy. He felt they didn't even warrant being incised. How and why were they recorded as the major cause of death after the second autopsy.

Reference is made to the 5 months interval between the 1st and 2nd autopsy. That the first autopsy did not establish a known cause of death. But, though cause of death remained undetermined, the petitioner was charged and indicted for 1st degree murder. It is clear that the second autopsy was arranged and set up to try and find cause for the arrest, and charges placed against the petitioner.

It is apparent that the findings of the first autopsy were supported by an examination by a qualified pathologist, and that the exhuming of the body and the second autopsy being conducted without the jury being informed of the changes in the body due to the rough handling and elapsed time was fundamentally unfair.

That the x-rays taken conclusively show that additional bone damage was recorded and occurred during the interim of the 1st and 2nd autopsy. And that if the handling was so rough that bones were damaged, then it is clear that no scientific data could have been established as to the effects of such bruises that had been held superficial by the examining pathologist at the first autopsy.

That in every other line of evidence the State is required to show the chain of evidence that is presented, why is not the burden on the State to show such in this case.

It is submitted that the lettering of and permission given to the State to offer evidence concerning the second autopsy performed some five months after the first one, without requiring the State to show the treatment of the body in the interim, was such that denied to the petitioner his constitutional right to a fair and impartial trial.

ARGUMENT NO. VI

ROBERT E. PORTH IS ENTITLED TO A HEARING ON HIS PETITION FOR HABEAS CORPUS.

The petitioner was not given a fair, factual hearing in the state courts. The state courts failed to take into full account the full impact of the massive pretrial publicity, particularly the media publication of information which was incompetent as evidence. Moreover, the petitioner has made a substantial allegation of newly discovered evidence. It is respectfully submitted that petitioner should be awarded a hearing on his petition for a writ of habeas corpus. 28 U.S.C. Section 2254(d)(2),(3),(6),(7) and (8).

CONCLUSION

For the reasons stated herein, in the record, and the petition for writ of certiorari filed in this cause, it is submitted that the petitioner is entitled to relief in this Court. That it is apparent that he was denied his constitutional right to a fair trial secured to him by the United States Constitution in Section 1 of the Fourteenth Amendment to the United States Constitution. That he has been denied proper review of his con-

stitutional issues in the state courts and the District Court and the United States Court of Appeals below. That a determination of this cause on the merits shows that relief is warranted, if not on one single issue, then the cumulative effect of them only lead to one fair conclusion, and that he was denied his right secured by the United States Constitution to a fair and impartial trial.

WHEREFORE, for the herein stated reasons, as supported by the records, and petition for certiorari, it is respectfully MOVED and PRAYED, that this Court will grant and issue in the behalf of the petitioner a writ of certiorari in such form and manner as the Court may direct to the end, that the MEMORANDUM DECISION and ORDER entered in this cause in the United States Court of Appeals for the Fourth Circuit on January 24, 1973 and March 5, 1973, respectively, may be reviewed and the judgments of the United States Court of Appeals for the Fourth Circuit in these matters, be reversed, and this Court remand this case to the United States Court of Appeals for the Fourth Circuit, or the District Court for the Middle District of North Carolina, as decided by this Court, for the grantment of the relief, that this Court finds that the petitioner is entitled to upon a determination of the merits of this cause, i.e. new trial, appeal re-instatement, plenary hearing in District Court.

Respectfully submitted,
ROBERT E. PORTH
Petitioner pro se
In propria persona

September 24, 1973

Central Prison
835 West Morgan Street
Raleigh, North Carolina 27603

STATE OF NORTH CAROLINA)
)ss.:**VERIFICATION**
COUNTY OF WAKE)

ROBERT E. PORTH, being first duly sworn on oath, represents that he has subscribed to the above and states that the information contained therein is true and correct to the best of his knowledge and belief.

ROBERT E. PORTH
Affiant

SWORN TO AND SUBSCRIBED
BEFORE ME, THIS —— DAY
OF SEPTEMBER, 1973.

_____

NOTARY PUBLIC

_____

CERTIFICATE OF SERVICE

SUPREME COURT OF THE UNITED STATES

NO. 72-1580, October Term, 1973

ROBERT E. PORTH,

Petitioner,

vs.

WARDEN OF THE STATE PENITENTIARY OF NORTH CAROLINA,

Respondent.

I HEREBY CERTIFY, that on this 24th day of September, 1973, three copies of REPLY BRIEF, were placed into an envelope addressed to counsel of record for respondent, Hon. Richard N. League, Assistant Attorney General, N.C. Department of Justice, Post Office Box 629, Raleigh, North Carolina 27602 That the said addressed envelope containing the three copies of this action, were placed into the United States Mail, for postage prepaid delivery to the said Counsel of Record for the respondent by certified mail, return receipt requested on this date. I further certify that all parties required to be served have been served.

ROBERT E. PORTH
Petitioner pro se
In propria personam

Central Prison
835 West Morgan Street
Raleigh, N.C. 27603